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Supreme Court of the United States

OCTOBER TERM, 1936

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, v. FRUEHAUF TRAILER COMPANY, *Respondent*.	No. 420
NATIONAL LABOR RELATIONS BOARD, *Petitioner*, v. FRUEHAUF TRAILER COMPANY, *Respondent*.	No. 421.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF OF FRUEHAUF TRAILER COMPANY, Respondent

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BRIEF OF FRUEHAUF TRAILER COMPANY, Respondent

Statement of Case

These proceedings involve the validity and application of the National Labor Relations Act (Public No. 198, Seventy-Fourth Congress of the United States, First Session, approved July 5th, 1935; 29 U. S. Code, Section 151 et seq.) in relation to employees engaged solely in manufacturing operations in the State of Michigan.

Parties Involved

Respondent is incorporated under the laws of Michigan, and is primarily engaged in the business of manufacturing trailers, semi-trailers, carryalls and parts and accessories therefor. The trailers manufactured by Respondent are commercial trailers, as distinguished from camp trailers. The principal office of the Company and the factory, where its manufacturing operations are conducted, are located in the City of Detroit, Michigan (R. 70-71).

The National Labor Relations Board, at the time of the hearing, consisted of three members, J. Warren Madden, Chairman, Edwin S. Smith and John M. Carmody, who were appointed to office by the President on October 24th, 1935, pursuant to Section 3 (a) of the National Labor Relations Act. Mr. Carmody has since resigned and has been succeeded by Donald Wakefield Smith.

Proceedings Before the National Labor Relations Board

(a) The Charge Pursuant to Which the Complaints of National Labor Relations Board Were Issued.

On October 4th, 1935 the United Automobile Workers Federal Labor Union No. 19375, affiliated with the American Federation of Labor, and six former production and manufacturing employees of Respondent filed a charge with the Board, by their attorneys, Charlton Ogburn and Arthur E. Reyman, averring that the Respondent is engaged in the manufacture of trailers—

> "and is engaged in commerce among the states in its manufacturing plant in Detroit in that its

materials come from other states and are manufactured into trailers for shipment into other states; and it is otherwise engaged in interstate commerce (R. 4)."

In this charge it was further averred that Respondent had discharged these six employees because of their union membership and refusal to resign therefrom, that the result of said discharges would be to create industrial unrest, which would burden and obstruct commerce, and that Respondent was thereby engaged in alleged unfair labor practices within the meaning of Section 8, sub-sections (1), (3) and (4), of the Act. A similar charge was filed with the Board under date of October 17th, 1935, by the United Automobile Workers Federal Labor Union No. 19375 and another employee of Respondent by the same attorneys, containing similar averments in respect to that employee as were embodied in the first charge in respect to the other six employees (R. 7).

These charges were filed pursuant to Section 10 (b) of the Act. Copies of these charges were never served upon Respondent, nor were they furnished to Respondent or its attorneys prior to the receipt of the printed Record in the Court below.

(b) The Complaints of the National Labor Relations Board.

On October 23rd, 1935, the Board, by its Acting Regional Director for the Seventh Region, issued a complaint against Respondent at Detroit (case VII-C-1) (R. 9). In this complaint the Board alleged that Respondent had discharged and refused to reinstate six production and manufacturing employees because of their affiliation and

activity in United Automobile Workers Federal Labor Union No. 19375. The Board in this complaint further averred that Respondent is engaged in the production, sale and distribut n of trailers, semi-trailers, carryalls, trailer parts and trailer accessories; that Respondent is the largest organization in the trailer industry, and that its operations constitute about thirty-five per cent (35%) of the entire industry; that Respondent purchased materials which were shipped to its plant at Detroit from other states, and that the trailers produced by it at the Detroit plant were sold and transported by Respondent in interstate commerce to points outside of the State of Michigan, "constituting a continuous flow of commerce among the several states" (R. 10). The Board in its complaint concluded that the discharge of the six employees, production and manufacturing workers at the Detroit plant, constituted unfair labor practices within the meaning of Section 8, sub-sections (1) and (3), of the Act, occurring in commerce among the several states, and that "on the basis of experience in the aforesaid plant and others in the same and other industries, burden and obstruct such commerce and the free flow thereof, and have led and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof" (R. 15).

On October 29, 1935 the Board issued another complaint against Respondent, based upon the charge of the seventh employee, Peterson, dated October 17, 1935. This complaint (case VII-C-3) also involved a manufacturing and production employee and contained similar allegations to those set forth in the complaint of the Board in case VII-C-1 involving the six employees hereinabove mentioned (R. 17). To each of these complaints (cases VII-C-1 and VII-C-3) was attached a notice designating the hearing

before the Board on November 6th, 1935. The Board by order of October 29th, 1935, consolidated the cases VII-C-1 and VII-C-3 for hearing (R. 22).

(c) Proceedings Before National Labor Relations Board.

Respondent, appearing specially, filed a motion to dismiss the complaint in case VII-C-1 on the grounds that the Board lacked jurisdiction over both the subject-matter and the person of Respondent. Attached thereto and in support of the motion was the affidavit of Earl L. Vosler, Vice-President in charge of manufacturing operations of Respondent, setting forth the fact that the six employees covered by the complaint were employed in the production and manufacturing operations of Respondent, and that in these operations and in their relationship with Respondent neither they nor Respondent were engaged in interstate commerce and, therefore, were not subject to the regulations of the Congress of the United States or the jurisdiction of the Board. This and various other jurisdictional and constitutional objections were set forth in the motion filed October 29th, 1935 (R. 23) and are the same jurisdictional and constitutional objections to the Act and to the application thereof as are contained in the petition to review and in the answer and return to the Board's petition to enforce, in the Circuit Court of Appeals.

Without affording Respondent an opportunity to offer proof or to be heard thereupon, the Board on November 4th, 1935, entered an order overruling the motion of Respondent to dismiss case VII-C-1 (R. 28). Thereafter, on November 5th, 1935, Respondent filed a motion to dismiss case VII-C-3, similar in content to the motion to dismiss case VII-C-1. Answers in both of the cases (VII-C-1

and VII-C-3) (R. 29, 37) were served upon local counsel for the Board, to be filed by him conditionally, only in the event of an adverse ruling by the Board of the motions to dismiss (R. 67). In these answers, Respondent reserved and relied upon the same jurisdictional and constitutional objections to the Act and to the application thereof as were raised by the motions to dismiss.

The hearing of the consolidated cases (VII-C-1) and VII-C-3) by the Board, sitting at Detroit, commenced the next morning, November 6th, 1935. The motion to dismiss case VII-C-3, then pending and undetermined, and the motion to dismiss case VII-C-1, thereupon renewed, were submitted to the Board by counsel for Respondent upon the opening of the hearing. The testimony of Earl L. Vosler, Vice-President of Respondent in charge of manufacturing, was thereupon taken in support of one of the grounds of the motion attacking the jurisdiction of the Board over the subject-matter, to-wit:

> "2. All of the Fruehauf Trailer Company's manufacturing plants are located in, and all of its manufacturing operations are conducted in the City of Detroit, State of Michigan. The employees covered by the complaint of the National Labor Relations Board hereunder were employed in the production and manufacturing operations of the Fruehauf Trailer Company, and in these operations and in their relationship with Fruehauf Trailer Company, neither they nor Fruehauf Trailer Company were or are engaged in interstate commerce, this relationship between such employees and Fruehauf Trailer Company being incident to its manufacturing operations, to wit, the transformation of and fashioning of raw and unfinished materials through an involved and intricate manufacturing process into a different and completed

> form, to wit, a finished trailer or parts thereof, which operation is local in character and is not subject to regulation of the Congress of the United States or to the jurisdiction of the National Labor Relations Board." (R. 24).

In the testimony (R. 66-84) of Vosler is a complete analysis and description of the business of Respondent, of the purchase of raw materials and other materials prior to the manufacturing operations. Then there is an explanation and photographic description of all of the production and manufacturing operations at the plant in Detroit and the nature of the work performed by the seven production employees involved in these proceedings. After describing the manufacturing operations, Vosler then told of the sale and distribution of the completed trailers succeeding the manufacturing operations. Counsel for the Board extensively cross-examined Vosler (R. 84-162), and then offered testimony as to certain shipments, by rail and by truck, of the finished trailers and parts thereof (R. 162-167) to close the proof in respect to the interstate commerce phase of the case (R. 162).

After oral argument, the Board overruled, and affirmed its previous order overruling, the motion to dismiss case VII-C-1 and overruled the motion to dismiss case VII-C-3, to which rulings and orders an exception was noted (R. 200). The answers of Respondent to cases VII-C-1 and VII-C-3 (consolidated for hearing), renew the motions to dismiss and reserve all jurisdictional objections to the proceedings as set forth in the motions (R. 29, 37) and were filed without waiving the exception to the ruling of the Board denying the motions in accordance with Article II, Section 17, of the Rules and Regulations of the Board then in force.

The answers having raised the same jurisdictional objections as the motions, counsel stipulated that all of the evidence introduced and admitted on the motions to dismiss be incorporated in the Record as evidence on the issues raised by the complaints of the Board and the answers of Respondent, which stipulation was approved by the Board (R. 67, 200, 487).

(d) Labor Relationship of the Fruehauf Trailer Company and Alleged Unfair Labor Practices.

Respondent, although incorporated in 1918, traces its beginning to the small blacksmith shop and wagon works owned and operated in Detroit, Michigan, by August C. Fruehauf in 1897. With the growth and development of the automobile business the trailer business grew up—and trailers were developed from clumsy, slow-moving wooden trailers to the present steel-framed, covered body, power-braked, scientifically engineered trailer. In the development and growth of Respondent before and after its incorporation, August C. Fruehauf, himself, worked in the first small shop with the men employed by him (R. 70).

As this small business grew and developed, his sons, Harvey (now President of the Company) and Harry (now Vice-President of the Company) and Earl L. Vosler (now Vice-President in charge of the manufacturing) came into the business and took a hand in its development. As the business grew, more and more men were employed by the Company and the earnings for the most part were continually put back into the business for larger factory, more machinery and equipment, for larger production and for more and more employment of men. From the small blacksmith shop and wagon works

employing but few men, the Company has grown so that today the Respondent is the largest trailer company in the industry. At the time of the hearing the factory covered about nine acres and approximately 700 men were employed in the manufacturing and production of trailers (R. 70, 71). About 200 people are employed in other divisions of the business, making a total employment as of the time of the hearings of about 900 people (R. 123).

At the time of the hearing, the Respondent had only one factory and all of its manufacturing operations were exclusively carried on at that plant in the City of Detroit, Michigan (R. 71). The proof shows that at the time of, and prior to, the hearing before the Board, the workmen in the manufacturing and production departments of Respondent received "higher wages than those paid to similar classes of employees by companies engaged exclusively in the manufacture of trailers" (R. 80, 276), and that "as compared with a number of other industries that are more seasonable" and "compared with the average industry in the City of Detroit our men do have more steady work than most of the men in the other plants . . . . throughout the entire year" (R. 271). The superintendent and the foremen in the factory always have been ready to discuss any problem of employment with employees, and the Company built up its business and organization on the principle that production and efficiency increase where employees are earning good wages and are satisfied (R. 278).

Even certain of the complainants, discharged employees of the Company, admitted that the workmen were treated fairly. One said that the foreman Rosenbusch "was at all of the times nice to him" (R. 311); and another of these discharged employees when asked whether the

Company treated him well at all times, answered "fine" (R. 458). Still another employee, not one of the complainants but a union member, called by the Board to testify, said "they have treated me all right. At one time I had a lot of trouble about something, and I went up to the superintendent and he sent me up to Mr. Vosler, and Mr. Vosler helped me . . . When I was going to lose my house he got a lawyer to help me out," and the Company lawyer helped "save something by it" (R. 366, 367). They were always afforded an opportunity to discuss matters of their employment with their foreman (R. 314, 321, 366, 426, 458). They admitted that the men knew of the Company rule for the workmen, that "if you don't get satisfaction out of your foreman, come in and see the superintendent," and that the superintendent had never refused to discuss matters of employment with any of them (R. 426). It was further admitted by these men that their wages had been increased between four and five times from the depression period of 1933 to the time of their discharge, and that many of these increases were factory-wide increases (R. 312, 321, 425). The wages paid were the highest in the trailer industry (R. 80, 276).

The United Automobile Workers Federal Labor Union No. 19375 was organized in May of 1934 (R. 418) by outside organizers not connected with Respondent, but representing the American Federation of Labor (R. 419, 420). The President of the Union, Sprytzer, claimed that about forty Fruehauf production employees joined the Union at that time (R. 420), and stated that these men were urged by the American Federation of Labor organizers to make an active drive for members at the Fruehauf plant (R. 420). A $2.00 initiation fee was charged a member upon joining the Union, one-half of which was paid to the American Federation

of Labor and the other half retained by the local Union. In addition there are monthly dues (R. 435, 436).

The management warned union men against agitating and soliciting members during working hours, because it stirred up arguments among the workers who refused to join and impaired the morale and efficiency of the shop (R. 247, 248, 281, 312, 322). The continued violation of this rule, despite warnings, was the cause for the discharge of two of the employees here involved.

The Board in its findings said that the Union had "177 active members and about 100 members who at one time or another paid dues and did not usually attend meetings. The production and maintenance men at respondent's factory at that time numbered about 400" (R. 50). On what testimony the Board bases this finding is difficult to determine. When asked about the union membership, Sprytzer, President of the Union, either showed an astounding lack of knowledge for the President of a union who was active in soliciting new members, or an obvious evasiveness.

> "Q. What was the largest membership you ever had of that Union?
>
> "A. I don't know whether I have to answer that.
>
> "Mr. Klein: I think you do.
>
> "Chairman Madden: I think that is a fair question.
>
> "A. (Continuing): *To tell the truth, I don't know.*
>
> "Q. (By Mr. Klein): Did you have one hundred members?
>
> "A. Over, I think.
>
> "Q. Did you have one hundred and twenty members?
>
> "A. I would say—

"Q. Just about 120 members?

"Mr. Patterson: Now, wait a minute.

"A. (Continuing): More than that.

"Q. (By Mr. Klein): 140 members?

"A. I don't know the exact number.

"Q. Well, was it less than 150?

"A. You see, the recording secretary never let us get into his books, not even myself.

"Q. Weren't you president of that local?

"A. I was.

"Q. Weren't you interested in knowing how many members you had?

"A. Yes, sir; I was" (R. 421).

And only after he was confronted with a telegram of the American Federation of Labor claiming to represent "all of the employees in your plant" (Exhibit 16, R. 443) did Sprytzer then try to claim that a majority of the production employees belonged to the Union.

"Q. Did you ever have on your rolls more than 120 members?

"A. Yes.

"Q. When?

"A. I do not recall.

"Q. I just asked you before, how many you had?

"A. I do not recall.

"Q. What is the most you ever had on your rolls?

"A. *I do not remember.*

"Q. You do not remember?

"A. No.

"Q. You told me, I believe, that 120 was about the most you had?

"A. I do not know.

"Q. You would not say that you had more, would you?

"A. I do not know.

"Q. You would not say that there were not any men in the plant who did not belong to the union, would you?

"A. Oh, yes, there was.

"Q. There were?

"A. Yes.

"Q. But this says that you represent them all?

"A. That is what it says" (R. 444).

Union membership records were not made available. The President of the Union did not choose to know how many members there were. The only suggestion that there were 177 members came from Peterson, whose testimony was of doubtful probity or value.

Nor is there any proper basis for the Board's finding that there were only 400 men in the manufacturing and production departments. The only proof to this effect was the following offered by the discharged employee, Peterson:

"Q. • • • How many employees did this company employ in the production and maintenance departments?

"A. Well, I don't think—of course *I have no definite figures.* I don't see any reason why they can't *find out from a better source than me*, but *I don't think* they have over 400, *or I don't think* that many employees, that is, I don't mean bellhops or telephone operators or salesmen or people working outside the factory or people who were not eligible for our union. I mean just the factory workers, production workers" (R. 484).

Peterson admitted he had no definite figures, and that there was a better source from which to obtain information. He predi ated his testimony on a guess and not on facts or figures. But the Board nevertheless based its findings on this testimony, although the same pro-

duction employees (including Peterson) filed a charge with the Board (R. 4, 7) stating that the Company employed approximately 600 employees, and Earl L. Vosler, Vice-President of Respondent in charge of manufacturing, who had access to the records of the Company, testified that at the time of the hearing 700 men were employed in the manufacturing and production departments of the Company, and that altogether the Company employed approximately 900 people (R. 71, 123).

(e) Unfair Labor Practices Charged by Board.

In the complaints filed by the Board (R. 4, 7), it is alleged that Respondent discharged the seven employees involved in this proceeding because of their Union membership and activity; that these acts of Respondent would create industrial unrest, and that these acts would, "on the basis of experience in the aforesaid plant and others in the same and other industries, burden and obstruct such commerce and the free flow thereof, and have led and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof" (R. 15, 17). The employment of a factory detective to report union agitation during working hours was stressed by the Board at the hearing as a practice that would stir up unrest and burden commerce.

The only testimony as to the experience at the Fruehauf plant, elicited by the Board, negatived any showing of labor difficulties and showed that since the date of its first operations there had not been a strike at the plant which hampered its operations (R. 136):

> "Q. (By Chairman Madden): Mr. Vosler, what would be the effect upon interstate commerce of a successful strike in those departments

> of your plant where these men named in the complaint work?
>
> "A. Well, I do not know, Mr. Chairman. I cannot imagine anything like that. *We have never had a delay of any kind in our operations, and I do not know just what the result would be.*"

Nor was there any showing that the discharges caused a strike at the plant or caused a delay in operations. The proof of the complaining discharged workers show that only 35 men voted for a strike out of a total of 700 production and manufacturing employees, and that only 67 employees voted at the Union meeting; that the suggestion of a strike was voted down (R. 430) even after the American Federation of Labor organizer explained the strike program (R. 438). The proof further shows that thereafter and until the time of the hearing that there were no reports of dissension or dissatisfaction spread around the factory (R. 278).

In reply to the charge of unfair discrimination in the discharge of the seven employees involved in these proceedings, Respondent in its answers (R. 34, 35) said:

> " • • • that from the period of June 25th, 1935, to July 21st, 1935, because of a then decided falling off of its business and the consequent reducing of its manufacturing operations that seventy-two (72) production and manufacturing employees were laid off or dismissed, including the six (6) employees specifically named in the complaint. Further answering said paragraphs of the complaint, Respondent, Fruehauf Trailer Company, shows that wherever said men were laid off or otherwise dismissed, including those men named in the complaint, that said Respondent, Fruehauf Trailer Company, reduced its force in such a manner as to retain those who in its judgment were the most efficient and capable employees and with a view of continuing

the employees who could and would most efficiently perform their work, who showed the greatest interest in their work, who appeared to have the best interest of Respondent and the success of its operations at heart, and who would most harmoniously work with others in the various production departments to the end that its production and manufacture of trailers would carry on successfully and profitably and would inure to the benefit of the Respondent and to the employees of the Respondent who would benefit by the continued and successful operation of the business of Respondent by a continued and steady employment."

Similar answer was made in Case VII-C-3 involving the seventh employee (R. 38).

Witness Vosler was called by the Board in this phase of the case. After the examination by the Board, counsel for Respondent elicted proof from him in support of the averments in the answer as to the reason for the discharge of the seven employees involved in this case (R. 235, 248, 258, 265). The testimony showed that in discharging and laying men off during a slack period of production, the same standard was applied to Union and non-Union men (R. 265). Union men were retained on the rolls as well as non-Union men (R. 265, 281, 276, 269), the determining factors being the efficiency of the workman, his cooperation and whether or not he appeared to have the Company's best interests at heart in performing his duties (R. 265, 267).

All of the testimony in respect to the alleged unfair labor practices, except that adduced from Vosler, was developed by the Board mainly through discharged employees who were openly hostile to Respondent.

Respondent called no witnesses and offered no proof on the question of alleged unfair labor practices, except that brought out on cross-examination of discharged employees, and from witness Vosler, called by the Board on this phase of the case. The Company at all times relied upon its position that the Board had neither jurisdiction over the subject-matter of these proceedings, nor over the person of Respondent, that the Act, as a whole, was invalid and the attempted application thereof by the Board to Respondent in these proceedings was unconstitutional.

It is these constitutional and jurisdictional questions which are raised by the petition in the Circuit Court of Appeals to review and reverse the order of the Board (R. 492, 496).

(f) Decision and Order of National Labor Relations Board.

On December 12, 1935, the Board rendered its decision (R. 45-59), and embodied as a part thereof an order (R. 58) directing Respondent (a) to cease and desist from certain acts relating to the discharge of employees, interference with employee activities and membership in the Union; and (b) to take certain affirmative steps by way of re-employing the seven discharged employees, the complainants to the Board, with pay from the date of discharge to the date of reinstatement, and to post notices to its employees, in a conspicuous place in its plant, stating that it had ceased and desisted from doing the acts complained of in these proceedings.

On December 17, 1935, Respondent filed its petition in the Circuit Court of Appeals to review, reverse and set aside the order of the Board (R. 492), which

petition was supplemented by amendment filed December 23, 1935 (R. 500), to which petition and amendment the Board filed its return under date of February 2, 1936 (R. 506). The Board filed its petition for enforcement of its order under date of December 19, 1935, to which Respondent filed its answer and return under date of March 17, 1936 (R. 514). The petition for review (No. 7291) and the petition for enforcement (No. 7297) of the order of the Board of December 12, 1935, were consolidated for argument and hearing.

Decision Below

The Sixth Circuit Court of Appeals held that the Order of the Board in the case at bar—

> "undertakes to regulate and control the Trailer Company's relations and dealings with its employees engaged in the production and manufacture of trailers at the company's plant in Detroit and does not directly affect any of the activities of the Trailer Company in the purchasing and transporting to its plant of materials and parts for the manufacture and production of trailers or in the shipping or selling of such trailers after they are manufactured. It was issued under the authority of the Act of Congress of July 5, 1935, known as the National Labor Relations Act. The authority for the Act is claimed under the commerce clause of the Constitution. Since the order is directed to the control and regulation of the relations between the Trailer Company and its employees in respect to their activities in the manufacture and production of trailers and does not directly affect any phase of any interstate commerce in which the Trailer Company may be engaged, and since, under the ruling of *Carter v. Carter Coal Company*, 298 U. S. 238 (decided May 18, 1936), the Congress has no authority or power to regulate or

control such relations between the Trailer Company and its employees, the National Labor Relations Board was without authority to issue the order (See *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (5 C.C.A.), decided June 15, 1936)."

85 Fed. (2nd) 391 (R. 521-2).

Appropriate decrees were accordingly entered by the Circuit Court of Appeals. The Petition to Review, Reverse and Set Aside the Order of the Board was granted, and the Order was set aside (No. 7291), and the Petition of the Board to Enforce its Order was dismissed (No. 7297) (R. 520). Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit were issued by this Court at the instance of the Board on November 9th, 1936.

ARGUMENT

This being one of a series of cases all to be submitted at the same time in each of which is drawn in question the validity under the Constitution of the National Labor Relations Act and the action of the National Labor Relations Board thereunder in relation to a particular employer and this case being next to the last of such series it is believed that it will be more helpful to the Court for counsel in this case in such part as seems feasible to refer to and adopt the discussion in the briefs in the prior cases possessing the nearest similarities to this case supplementing such discussions in the other briefs with any additional thoughts or different attitude of approach and setting forth an original and complete discussion of only those points or matters wherein this case possesses its own particular facts or individual characteristics.

The briefs to which reference will be so made and the discussions therein adopted on particular points to be hereinafter specifically designated are

Brief on Behalf of Petitioner, The Associated Press, in No. 365, and

Brief for Respondent, Jones & Laughlin Steel Corporation, in No. 419.

These will for convenience be respectively referred to as the "Associated Press Brief" and the "Jones & Laughlin Brief."

Likewise the Brief for the National Labor Relations Board will be referred to as the "Board Brief," it being understood that such reference will be to the Brief in the Fruehauf case unless otherwise specifically stated in any particular reference.

Questions Presented

The statement of the questions presented in the Board Brief is accepted by Respondent, i.e., the questions there stated are all involved. But Respondent further insists that the additional questions stated as No's. 3 and 4 in the Board Brief in the Associated Press and Jones & Laughlin cases are also involved in this case. And Respondent prefers the statement in the Associated Press Brief, page (17), and in the Jones & Laughlin Brief.

Summary of Argument

I. The National Labor Relations Act is not a regulation of interstate commerce but of

(A) industry in general, and

(B) labor relationships generally

(by imposing "collective bargaining") and is in excess of the power of Congress under the Commerce Clause and violative of the Tenth Amendment and hence is void in its entirety. (Discussed infra 22 to 39)

II. In its manufacturing operations Respondent and its Production Employees are not

(A) in commerce,
(B) in the "stream," "current" or "flow" of commerce, and
(C) do not "affect commerce"

and hence are not subject to Federal control.

(Discussed infra 40 to 87)

The findings of the Board in relation to the Respondent and its discharged employees (which are at all of material consequence) are arbitrary and capricious and without substantial basis in the evidence.

(This is not discussed as a separate and independent proposition but runs all through the discussion under Point II.)

III. The National Labor Relations Act is repugnant to and in violation of the Fifth Amendment to the Constitution of the United States both in respect of procedural rights and of substantive rights.

(Discussed infra 88 to 110)

IV. The Act denies the right of trial by jury in violation of the Seventh Amendment.

V. The Act violates the First Amendment which guarantees to citizens freedom of speech.

Points IV and V are thoroughly discussed in the Associated Press Brief pages (93) to (102) both inclusive. Those arguments are adopted and these points rested thereon without further discussion herein.

POINT I.

The National Labor Relations Act is not a Regulation of Interstate Commerce but of

(A) Industry in General, and

(B) Labor Relationships Generally

(by imposing "collective bargaining") and is in excess of the power of Congress under the Commerce Clause and violative of the Tenth Amendment.

The discussion of the Associated Press Brief (pp. 18 to 36 both inclusive) is adopted in toto.

The point is also discussed in the Jones & Laughlin Brief and such discussion likewise adopted.

A. Industry in General Regulated by Act.

The National Labor Relations Act is on its face an attempt to impose a statutory requirement of collective bargaining, which will be binding upon all of the industries throughout the country.

The law was patterned after and intended to carry on and supplement the provisions of Section 7 (a) of the National Industrial Recovery Act after it expired on June 16th, 1935. "Congressional Record, Vol. 79, No. 101, Wednesday, May 15th 1935, Senate p. 7855:

> "Mr Wagner: Of course, the N. I. R. A. has section 7 (a) in it; but this bill proposes in the first place to define the rights of labor more clearly; and, secondly, to implement them by certain enforcement sanctions.
>
> "Mr. McCarran: Just one further inquiry. Am I correct in saying that even though the N.R.A. should pass out of existence with section 7 (a) as

it now stands in the N.R.A. Act, we should have all the beneficial results that might flow from section 7 (a) if we should enact the pending bill?

"Mr. Wagner: That is certainly a correct statement so far as section 7 (a) is concerned."

Up to the time of the adoption of Section 7 (a) of the National Industrial Recovery Act, the relationship between the management and the employees in an enterprise was based upon mutual understanding, was dependent upon mutual interest in the enterprise and good will, rather than upon compulsory governmental regulations. Employees always had the right to discuss the terms of their employment in respect to wages, hours and working conditions, either individually or collectively; and to join labor organizations and engage in union activities or refrain from membership in labor organizations. On the other hand, employers had theretofore always had the right to exercise their own judgment and discretion in the hiring, promotion, discharging or demotion of employees. Regulation by the states went only to workmen's compensation acts and to protection of the workingman from hazardous or dangerous work or unhealthy working conditions or excessive hours. Congress had authority to make regulations relating to employees only where such regulation involved employees directly operating in interstate railway transportation, *Wilson vs. New*, 243 U. S. 332, and then only in face of an impending strike, and this decision the court said went "to the border line" of constitutionality (see comment of court in respect to the decision of *Wilson vs. New*, in *Wolff Packing Company vs. Court of Industrial Relations*, 262 U. S. 522, 544. See *Texas & New Orleans Ry. Co. vs. Brotherhood of Ry. and Steamship Clerks*, 281 U. S. 548, 570; 74 L. Ed. 1034.

Under Section 7 (a) of the National Industrial Recovery Act, Congress attempted for the first time to compel bargaining activities between the employer and employee in *all industries* throughout the Nation. The government attempted to sustain Section 7 (a) of the National Industrial Recovery Act as a regulation of interstate commerce by Congress, on the strained theory that a refusal on the part of the employer to bargain collectively with employees under a statutory compulsory requirement, as compared with the free and voluntary bargaining between employer and employee, tended to lower wages, cause dissensions and strikes, which would result in a falling off of prices, a slowing up of production, and, therefore, burdened or affected interstate commerce or the free flow thereof, since less merchandise and goods would be sold and transported in commerce.

The Labor Disputes Act, Public Resolution No. 44 of the Seventy-third Congress, First Session, supplemented Section 7 (a) of the National Industrial Recovery Act and attempted to provide for the administration and enforcement of Section 7 (a) by a National Labor Relations Board, and it too was abandoned after the decision in the *Schechter* case. Under the Labor Disputes Act, the National Labor Relations Board attempted to apply the law to all of the industries in the country. The Board formulated the so-called "majority rule," which, although not in the Labor Disputes Act, was later enacted and made a part of the National Labor Relations Act.

The Act here before the Court was introduced to the Congress by Senator Wagner of New York in March, 1935, before the decision in the *Schechter* case on May 27th, 1935. Hearings before the Committee on Education and Labor of the United States Senate were held from March 15, 1935 to April 2, 1935 (see hearings before Committee on

Education and Labor, United States Senate, Vols. 1, 2 and 3, U. S. Government Printing Office), and the "Findings and Policy" of Section 1 of the Act were predicated thereupon.

On May 15th, 1935, Senator Wagner, in advocating the adoption of the National Labor Relations Act and in tracing its development from Section 7 (a) of the National Industrial Recovery Act, attempted to justify the Congressional authority to enact Section 7 (a), saying in Congressional Record, Vol. 79, No. 101 (p. 7849), Wednesday, May 15th, 1935 as follows:

> "The first hypothesis was that the interpenetration of **all industries* throughout the country the nonconformity of economic organization to State lines and the deep-seated and widespread character of the national calamity, made Nation-wide action essential • • •
>
> "Congress determined to fix wages and hours at a level that might, by re-employment and higher pay spread adequate purchasing power among the masses of consumers and thus prime the pump of business."

Then after discussing the weaknesses in Section 7 (a) and in the Labor Disputes Act, Senator Wagner, speaking of the Act, here before the Court, said at p. 7851:

> "The present bill cures the defects in existing law. It clarifies and *amplifies* the provisions of section 7 (a), and it centralizes in a single permanent National Labor Relations Board the duty to protect the collective-bargaining right of employees."

The bill as introduced was amended in the Senate on May 16th, 1935, and was passed and sent to the House for action

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*Italics in quotations throughout this Brief are the writer's unless otherwise indicated.

on May 17th, 1935, all prior to the decision in the *Schechter* case on May 27th, 1935. While the bill, as favorably voted upon by the Senate, was pending in the House, the Supreme Court decided the *Schechter* case. The hearings before the Committee on Labor in the House were continued, and on June 10th, 1935, two weeks after the *Schechter* decision, the Committee on Labor in the House filed its report through Mr. Connery, the sponsor of the bill in the House (House Report, No. 1147, June 10th, 1935), and after reviewing the reason for the adoption of Section 7(a) in the National Industrial Recovery Act and the weaknesses thereof, Mr. Connery said, on behalf of the Committee, in this report on page 7:

> "The time for appropriate action by the Congress is at hand, because on June 16, 1935, the National Industrial Recovery Act, and Public Resolution 44, Seventy-third Congress, expire by limitation. The Congress does not propose to withdraw the 'new charter of rights' enacted in section 7 (a). The only honest thing for the Congress to do, therefore, is to provide adequate machinery for its enforcement which is the object of the present bill."

During the consideration of the bill in the House as first approved by the Senate, some twenty-five minor amendments were proposed by the House Committee and reported to the House on June 10th, 1935, (House Report No. 1147), and all of these amendments, except four, were agreed upon by a conference committee of Senators and Representatives and reported on June 26th, 1935, (House Report No. 1371).

Section 1 of the bill as enacted is a redraft of Section 1 contained in the bill as first approved by the Senate, rephrased and amplified. The House redrafting of Section 1 was thought by the conferees "to contain a better state-

ment of the jurisdictional basis of the bill." (Conference Report, House Report No. 1371). Section 2, subsection 6, of the bill as enacted is essentially the same as first approved by the Senate, with a minor rephrasing, so that instead of the provision contained in this section in the bill as first approved by the Senate:

> "The term 'commerce' means traffic, trade or commerce, or any transportation or communication relating thereto . . ."

the provision in the bill as finally enacted reads as follows:

> "The term 'commerce' means trade, traffic commerce, transportation or communication . . . "

Likewise Section 2, subsection 7, of the bill as enacted was amended by "a minor change . . . by removing the tautological phrase" (Conference Report, House Report No. 1371.) Section 10 (a) of the bill as enacted, which provides that the Board is empowered to prevent alleged unfair labor practices "affecting commerce," is identical to the section contained in the bill as first approved by the Senate. The other amendments proposed in the House did not pertain to the jurisdiction nor the underlying basis of the bill; these amendments were minor in character and for the most part consisted of a substitution of words merely for purposes of clarification.

It may be fairly stated that the bill as finally enacted a month after the decision in the *Schechter* case was substantially the same in substance as the bill first introduced in the Senate and approved by the Senate prior to the *Schecter decision*. Two weeks after the *Schecter* decision, and after the House Committee had made the various amendments to the bill, Representative Connery likewise reported as quoted supra 26.

The jurisdictional basis, the object of the Act, the mode and method of achieving the alleged objects of the Act were all the same as those claimed by the Government in attempting to sustain the validity of Section 7 (a) of the National Industrial Recovery Act: to-wit, that by regulating employee-employer relationships in industries generally, to stabilize wages in industries throughout the nation, to maintain purchasing power, to increase or maintain price, more goods will be sold and transported in commerce between the states. By means of this tenuous tie-in to the Commerce Clause, more by way of statement and language than fact, Congress attempted to justify its authority in adopting this law.

In the Senate Report on the Act, May 1, 1935, Senate Report No. 573, Seventy-Fourth Congress, First Session, the Committee reported at page 18:

> "In effect upon commerce, wage levels are as significant as price levels, for the exchange of goods depends as much upon the consumer's income as upon the price which he must pay. • • • An analysis of the effect of a decline in mass purchasing power upon *all commercial transactions* forces the conclusion that the protection of *Nation-wide commerce* depends as much upon a floor for wages as upon a ceiling for prices. And in stabilizing wages, no factor plays a more important role than collective bargaining." (Italics supplied)

In the report of the Senate Committee, it appears that while the Act "is not intended to go beyond the constitutional power of Congress, as that power may be marked out by the courts," nevertheless, considering the report as a whole, it is directed to a compulsory collective bargaining between employer and employee, as a

means of stabilizing wages in *"all commercial transactions"* for the protection of *"Nation-wide commerce."*

In defining the rights of employees and alleged unfair labor practices, Sections 7 and 8 and other provisions of the Act may be said to be applicable to employees in industry generally and are not restricted to employees engaged in interstate operations. Although Section 10 (a) of the Act appears to limit the authority of the Board to cases of unfair labor practices "affecting commerce," nevertheless when the Act is considered as a whole it is clear that Congress intended it to apply to industry generally.

The same construction of the Act by the Board which extends the Act to include Respondent and its Production Employees will include practically all manufacturing and production business.*

It was not intended to maintain wages only in business where the employees were engaged directly in interstate commerce. To limit the operations of the Act to employees engaged directly in interstate commerce, and not to apply it to employees in industry generally, would not remove the alleged causes of lower wages and industrial unrest according to the report of the Senate Committee. The purchasing power to be maintained was that *"in all commercial transactions* • • • for the protection of *Nation-wide* commerce depends as much upon a floor for wages as upon a ceiling for prices."

The National Labor Relations Act is founded upon the same strained syllogism and theory, as Section 7 (a) of

*Just what the cases referred to in the Board Brief in the Associated Press case (p. 116) as having been dismissed for want of jurisdiction—apparently between five and ten per cent of the complaints—could have been does not appear.

the National Industrial Recovery Act, all of which is set forth in Section 1 of the Act, designated "Findings and Policy." That Congress was without power to regulate local labor relationships under the guise of regulating interstate commerce was determined by this Court in *Schechter Poultry Corp. vs. United States*, 295 U. S. 495, *Carter vs. Carter Coal Co.*, 298 U. S. 238. See "Findings and Policy" set forth in *Associated Press Brief* in Appendix immediately following page 102 of that Brief.

It is clear that the Act regulates labor relations in *industry* in general and not commerce, which may succeed it. The findings as contained in Section 1 of the Act all refer to what is there recited to be practice and experience in labor relationships in industry generally. From the report of the Senate Committee on the Act and from the findings and announced policy of the Act, it is clear that the purpose of the Act is to provide for a means of compulsory collective bargaining between employer and employee in industries generally. The causes which were alleged to have led to industrial unrest and strife were found to be causes existing in industry generally, and, therefore, to eliminate these causes the Act was adopted. It is clear that the intention of Congress in adopting the Act was to regulate employer-employee relationships in industry generally, which is beyond the power of Congress to regulate, under the guise of regulating interstate commerce.

B. Labor Relationships Generally Regulated by Act.

The Act is not directed to the regulation of interstate or foreign commerce, but is an attempt to regiment employees and workmen in industries generally into existing national labor unions and to subject industry as a whole thereto. In-

stead of diminishing industrial unrest under the pretense of promoting collective bargaining, the Act, as enacted, has increased, and will continue to increase, labor agitation, incite dissension and leave open to employees the constant threat and thought of strikes. Since the enactment of Section 7 (a) of the National Industrial Recovery Act, to date agitation for union members by national labor organizations has been greatly increased.

Under the so-called majority rule, provided for by the Act, the representative chosen by the majority of employees at the plant is designated the sole and exclusive bargaining agent of all employees at the plant in respect to wages, hours and other conditions of employment. The minority group of employees and the individual employees are restricted and limited in their right, except to report grievances. Under this rule individual employees or minority groups would be compelled to submit themselves to membership or have imposed upon them a representative which they have not chosen, who would make bargains by which they may not wish to abide. Likewise the employer's right of voluntary bargaining with individual employees or minority groups as to hours, wages and other conditions of employment is denied by the Act.

While the employer is restricted under Section 8 from interfering or coercing employees, there is no restriction in the Act against labor organizations coercing minority employees who refuse to join labor unions. Nor is there any restriction in the Act against interference or coercion of the employer by labor unions or agitators. While the Act provides for a machinery under which employees may seek an order from the Board against employers for alleged unfair labor practices, there is no provision in the Act which permits the

employer to seek relief and protection from the Board against any unfair labor practices of the employees, or by labor organizations. And even in cases where the employees seek relief before the Board, and even if the Board were to enter an order in favor of the employer and against the complainant as employee (an event which to this date has not yet come to our attention), there is no requirement under the Act which compels the employee to abide by the decision. Under the Act, the employer is bound by an adverse decision against him, whereas the employee in the event of an adverse decision may strike. Section 13 of the Act specifically provides "nothing in this Act shall be construed so as to interfere or impede or diminish the right to strike."

It is most significant that while under Section 8 of the Act, the employer is prohibited from discriminating against labor organizations, that Section 8, subdivision (3), of the Act nevertheless permits and sanctions a closed shop contract between employer and any labor organization purporting to represent the majority, and thus, in effect, force individual employees in such factories and the minority groups of employees, not wishing to join labor organizations, either to submit to membership or lose their jobs altogether. Admitting the right of employees by peaceful persuasion to attempt to convince other employees or the employers of the desirability of labor unions, the Act expressly prohibits and denies to employers the same privilege of peaceful and friendly discussion of the contrary thesis in respect to labor unions, and by expressly sanctioning the closed shop under Section 8, subdivision (3), of the Act in effect denies to individual employees or minority groups in such factories their means of employment, unless they submit themselves

to labor union membership and representation not in accordance with their choosing.

Quite contrary to the avowed purpose of the Act, "to diminish the cause of labor disputes," the Act in effect and operation has increased, and tends to increase, labor disputes because of its one-sided nature, binding employers and leaving entirely free from responsibility agitating and outside labor unions, which have stirred up disputes in industries where theretofore peaceful and harmonious employer-employee relationships existed. The Act in *its* operation will tend to stir up hostilities and antagonisms, instead of promoting peaceful and harmonious industrial relationship.

The regulation of the employer-employee relationship in respect to membership in labor unions aimed to prevent discrimination by the employer against employees for memberships in such organizations is not a regulation of interstate commerce, but has been held to be a regulation not within the authority of Congress under the Commerce Clause, even in a case where the employees involved were employees of an interstate railroad engaged in transportation. This Court so held in the case of *Adair vs. United States*, 208 U. S. 161, saying at page 178:

> "But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have *in itself* and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services."

And at page 179:

> ". . . . We hold that there is no such connection between interstate commerce and member-

> ship in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business *only* members of labor organizations, or *only* those who are *not* members of such organizations—a power which could not be recognized as existing under the Constitution of the United States."

To like effect is the holding in the case of *Railroad Retirement Board vs. Alton Railroad Co.*, 295 U. S. 330, 374, in which a regulation providing for a pension plan for employees of an interstate railroad was held—

> ". . . . in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractural incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency."

The case of *Adair vs. United States*, supra, still prevails and has not been overruled or modified by the case of *Texas & New Orleans Railroad Co. vs. Brotherhood of Railway & Steamship Clerks* supra, either on the commerce point or on the due process point. It is fully discussed infra 95, 100, in connection with the latter point.

The cases of

Schechter Poultry Corp. vs. U. S., 295 U. S. 495, and
Carter vs. Carter Coal Co., 298 U. S. 238

are the subject of eight pages of discussion in the Board's Brief in the Jones & Laughlin case beginning at page (86). An effort is there made to show that the decisions in those cases are not contrary to the contentions here made on behalf of the Board.

In the Schechter case "two counts charged violation of the • • • wage and • • • hour provisions of the code" (p. 527). These provisions are the subject of Section "Third" of the Opinion (p. 542) and likewise are dealt with in the concurring opinion (p. 554). Counsel for the Government in that case contended (p. 514)—

> "An additional basis on which the wage and hour provisions rest is that they are reasonable means for the prevention of labor disputes arising out of those subjects, and so are adapted to protecting interstate commerce from the burdens caused by labor disturbances."

The Guffey Act in Section (1) declares—

> "The right of mine workers to organize and *collectively bargain* for wages, hours of labor, and conditions of employment should be guaranteed • • • in order to avoid those obstructions to its interstate commerce that recur in the industrial disputes over labor relations at the mines."

The National Labor Relations Act in Section (1) declares—

> "Experience has proved that protection by law of the right of employees to organize and *bargain collectively* safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of *industrial disputes* arising out of the differences as to wages, hours, or other working conditions • • •."

In the Carter case Government counsel contended—

> "The collective bargaining provisions • • • also constitute a means peculiarly adapted to preventing the disturbance and injury to interstate commerce caused by the numerous and wide-spread strikes which have frequently recurred in the bituminous coal industry" (Brief, p. 239).
>
> "Obviously, the statutory guaranty of freedom of collective bargaining could stand alone and work towards the accomplishment of its intended objective entirely apart from the existence or operation of the wages and hours provision of the statute" (Brief, p. 281).

In the Board's Brief in the Jones & Laughlin case it is said (p. 92)—

> "Wage regulation might well be thought not reasonably calculated to eliminate the causes of industrial strife, and hence not to bear a reasonable relation to the protection of commerce, • • •
>
> "On the other hand protection • • • of collective bargaining has been proved by experience to be calculated to eliminate one of the most serious causes of industrial strife • • • traceable to the opposition to the • • • right of employees to • • • bargain collectively • • •"

Collective bargaining is put forward solely as a means to settle and fix wages and hours and conditions of employment. No difference can possibly exist in their relation to commerce, of statutory regulations providing for the fixing of hours and wages and such regulations providing for collective bargaining for fixing of hours and wages.

The Court in the *Carter* case said

> "The employment of men, the fixing of their wages, hours of labor and working conditions, the

bargaining in respect of these things — *whether carried on separately or collectively*—each and all constitute intercourse for the purposes of production, not of trade" (p. 303).

"A consideration of the foregoing, • • • renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, *collective bargaining*, and the Labor Board and its powers, primarily falls upon production and not upon commerce" (p. 304).

The legislative power cannot by its own recitals, findings and pronouncements of policy invest itself with authority not otherwise possessed. This Court has as often as occasion has arisen looked through the same to the real substance of what was undertaken to be done.

Schechter Poultry Corp. v. United States, 295 U. S. 495;
Bailey v. Drexel Furniture Co., 259 U. S. 20;
United States v. Butler, 297 U. S. 1;
Reickert Rice Mills v. Fontenot, 297 U. S. 110;
Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 526;
Prentis v. Atlantic Coast Line, 211 U. S. 210;
Chastleton v. Sinclair, 264 U. S. 543, 548.

As the primary object of the Act is in excess of the power of Congress to achieve, the Act cannot be sustained by limiting its application to employees engaged directly in interstate commerce which would not achieve its primary object or purpose.

Williams v. Standard Oil Co., 278 U. S. 235;
Trade Mark Cases, 100 U. S. 82, 98;
The Employer Liability Cases, 207 U. S. 463, 500.

The Act, as a Whole, Is Invalid.

The conclusion is inescapable that the purpose and object of the National Labor Relations Act, construed as a whole, is (1) to regulate labor employer-employee relationships in industries in general throughout the country, and (2) to regiment employees into national labor organizations. The purpose of the Act is not to regulate interstate commerce.

The relationship of employer and employee is one which is created voluntarily by the parties. Whether the interests of employers and employees in their industrial relationship, voluntarily created, can best be furthered and developed on the basis of mutual interest and confidence in the enterprise in which both are engaged, upon mutual understanding and good will and adjusted through normal economic processes, or whether the relationship between employers and employees should be subjected to compulsory regulation, antagonistic in spirit, and adjusted by the artificial processes of controlled economy and political machinery, is not open here to us for discussion. If legislative means are deemed to be socially, politically or economically desirable, they must be employed within proper constitutional bounds. As was said by the Court, in the case of *Schechter Poultry Corp. vs. United States*, 295 U. S. 495 at p. 549:

> "If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc.

All the processes of production and distribution that enter into cost could likewise be controlled. • • •

"It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it . . ."

POINT II.

In Its Manufacturing Operations Respondent and Its Production Employees Are Not

(A) in Commerce,

(B) in the "Stream," "Current," or "Flow" of Commerce, and

(C) do not "Affect Commerce"

and hence are not subject to Federal control.

Insofar as such operations of Respondent and the relations of Respondent with such employees are attempted to be regulated by

the National Labor Relations Act said Act exceeds the power of Congress and contravenes the Tenth Amendment,

the Orders of the National Labor Relations Board here before the Court said orders exceed any power which Congress did or could confer upon said Board and contravene the Tenth Amendment.

This obviously is a point upon which each case must stand upon its own facts. In discussing the facts reference cannot well be had to or adoption made of discussion of the facts in the Briefs in any other case. The Board Brief, page 18, in effect concedes that if this Court shall determine that under the facts and law the operations and employee relations now before the Court in the Associated Press and the Jones & Laughlin cases or either of such cases are not within the competence of the National Labor Relations Act or Board to regulate then beyond any question the operations and employee relations of Respondent here are not within such competence. And under such determination in either of those cases it would not be necessary to consider the detailed facts herein.

In discussing the facts in relation to this point it will be taken as a premise—which it is believed is undoubted—that, inasmuch as the question whether the Respondent's operations or its relations with the discharged employees is in interstate commerce or in such relation to commerce as to be subject to regulation by Congress and the Board (at least in the particulars here sought) goes to the jurisdiction of the Board to act at all, this Court will make its determination upon the facts as well as the law upon its own independent judgment.

That if the words of the Act purporting to otherwise limit the nature and scope of the determination of the facts by the Court is to be taken literally the Act is for that reason violative of the Fifth Amendment is discussed infra 88.

Even if there be any point of fact which does not go to the very jurisdiction of the Board to act at all as possibly for example the cause or reason for the discharge of any employees who are the subject of the complaint, the findings of the Board thereon are nevertheless so arbitrary and capricious and without substantial basis in the facts (as will appear in the discussion thereof shortly following) that this Court must disregard such findings under the rule enunciated and applied in

Tagg Brothers & Moorhead v. U. S. 280 U. S. 420, 443;
San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 442;
U. S. v. Abilene & Southern Ry., 265 U. S. 274, 286-290;
Interstate Commerce Comm. v. Diffenbaugh, 222 U. S. 42, 46-47;
Florida East Coast Ry. v. U. S., 234 U. S. 167, 187.

The Manufacturing and Production of Respondent and the Relation of the Seven Employees Involved in These Proceedings in Respect Thereto.

Respondent is primarily engaged in the business of manufacturing trailers, semi-trailers, carryalls and parts and accessories therefor. Its business is essentially that of converting and fashioning raw, unfinished and other materials through an involved manufacturing process into a completed and different form, and assembling them into the finished trailer product (R. 70).

Respondent has only one factory, which is located in Detroit, Michigan, and all of its manufacturing and assembly operations are exclusively carried on at that plant (R. 71), with the exception of certain assembly operations carried on by a wholly owned subsidiary, a Canadian corporation at Toronto, Canada (R. 90).* The factory at Detroit covers about nine acres, and at the time of the hearing seven hundred men were employed in the manufacture and production of trailers at Detroit (R. 71). For a photograph of the exterior of the Detroit plant see Exhibit 1-A (R. 71).

The seven men involved in these proceedings were men who were formerly employed in the production and manufacturing work (R. 71).

Trailers are non-automotive vehicles which are attached to and pulled by trucks or truck-tractors. The trailer business grew and developed with the growth and development of the automobile business. At first the trailer was a clumsy, slow-moving wooden affair, much

*Since the hearing subsidiaries of the Company have engaged in assembly operations in California and Kansas City.

like a wagon, from which it was developed to its present steel-framed, power-braked, scientifically engineered trailer, with variations of size, frame, carrying-load and bodies to meet the requirements of the goods being carried. The development and growth of the trailer business is described on page 6 of the Exhibit next below mentioned. Respondent, to meet the varying requirements of different types of business, has forty standard models of trailers, semi-trailers, four-wheel trailers and carryalls, with load capacities ranging from two tons to fifty tons of varying designs and with bodies suitable to the particular business for which they are required, see p. 12 "Engineered Transportation" (physical) Exhibit 12. Certain standard trailers built by Respondent are designed for hauling by one and one-half ton trucks, see (physical) Exhibit 5. Certain standard trailers are designed for hauling live-stock, see (physical) Exhibit 4, while other standard types of trailers are designed for different types of business, see photographs starting at page 20 of (physical) Exhibit 2.

Materials Used In Manufacturing Operations Are Purchased Prior Thereto.

Prior to and preceding the manufacturing operations at the factory, various raw, unfinished, partially finished and wholly finished materials necessary in the manufacture and construction of the trailers are delivered to the factory at Detroit (R. 72). To convert and change the raw or rough unfinished materials to their final manufactured form, "there are probably several hundred different machine operations required on different materials necessary in the manufacture of a trailer. There are over two hundred different parts requiring variation of these manufacturing operations for each trailer" (R. 76).

Axles are purchased of different standard sizes, and are received at the plant as rough, unfinished forgings. Before being used in the trailer, they are put through a number of different manufacturing and machine operations, such as turning operations on a lathe, grinding operations and drilling operations, each being done on separate machines and requiring separate handling (R. 72). Brake parts used on large trailers are almost completely manufactured at the plant from rough castings and forgings purchased according to standard specifications (R. 73, 116). Although the side-rails and some cross-members of the frame of a trailer are purchased from factories having large presses, Respondent manufactures some cross-members from sheet steel, which are purchased in rough form and require a number of manufacturing operations until ready to be molded into a part of a trailer (R. 72). In addition to these materials, Respondent purchases "a very considerable amount of malleable castings and steel castings, all in rough form, which require a number of machine, finishing and drilling operations" at the plant at Detroit before they are ready to be used in the assembly (R. 73). Rims, wheels, roller bearings, tires and springs are purchased according to standard specifications in completely finished form and are used in the assembly of the trailer (R. 73).

The bodies are almost completely manufactured from raw, rough and unfinished materials at the plant in Detroit (R. 73). The chief materials used in the construction of trailer bodies at the plant are lumber and sheet steel. Most of the lumber used is oak, ash, hickory and yellow pine. The hardwoods come in rough form, and all of the dressing is done at the plant at Detroit. The yellow pine is used exclusively for flooring. This has been tongued and grooved upon delivery. The yellow pine has

to be cut to length and holes drilled for fastening to the floor, in addition to other finishing operations, at the plant (R. 73).

Large quantities of sheet steel are used in the manufacture of bodies. The sheets of steel come in standard sizes and are cut and formed at the plant according to requirements. In the building of the trailer body, which is fastened to and built upon the chassis, a very considerable amount of labor and manufacturing and construction work are required. In building bodies, the materials for the most part are taken in an almost unfinished form and fashioned in the operations at the plant at Detroit (R. 74).

The various materials required by Respondent in the manufacture and assembly of trailers are bought through the purchasing department at the plant at Deeroit (R. 72). Some of the materials are shipped into the factory from out of the state, and some from within the state, although most of the suppliers of materials have Detroit offices and make the contact with Respondent for the sale of these materials at the plant at Detroit (R. 72). In 1934 approximately fifty per cent of the various materials required in the manufacturing operations were shipped to the plant from outside of the State of Michigan (R. 72). Materials which have their source outside of Detroit are shipped to Respondent f.o.b. Detroit, or with freight allowed to Detroit. For the most part, the risk of the transit is upon the shipper, and title vests in Respondent upon delivery to its plant at Detroit, although there may be some instances where this is not the case (R. 74). Some of the materials are shipped in by rail; some of the materials are delivered by truck and trailer, and a small amount of the materials is shipped in by boat (R. 74). Materials are pur-

chased in anticipation of orders being obtained in the course of business. Generally when materials are purchased, Respondent does not know into what particular trailer they may become a part (R. 74, 75, 80).

When the materials are delivered to the plant at Detroit, they are kept in a material inventory and commingled with other materials of like character at the plant. A smaller supply of completely finished materials is kept on hand than materials which require extensive manufacturing operations. Like all well conducted factories, the planning department at the factory attempts not to have an inventory of raw materials kept on hand prior to the manufacturing operations for a longer period than is necessary. Nevertheless experience at the plant shows that various materials purchased remain in this material inventory for a period of a month and sometimes for a period of two, three or four months before they are manufactured and become a part of the assembled, finished trailer (R. 74, 142, 143).

There is no testimony in the Record to support the Finding contained in paragraph 17 (R. 49), that "so closely are purchase, work and shipment synchronized that on occasion, work or shipment is delayed until required parts arrive to complete the assembly. Every day articles of commerce come into the Detroit plant from outside of the State of Michigan, and every day things produced or forwarded by the Respondent (Fruehauf Trailer Company) move out to various parts of the country." The testimony on this point appears at p. 150 of the Record:

> "Q. Is it not true in your case—*not usually*, perhaps, but is it not true that *some times* in your case you take materials that come in from a vendor, and put them promptly into processing?

"A. Yes.

"Q. In order to continue an assembly or to complete an assembly that might have been started?

"A. That happens.

"Q. That happens?

"A. But in *rare cases.*"

And at pages 134-135 of the Record:

"Q. (By Mr. Patterson) Mr. Vosler, is it not a fact that very often a trailer job is held up for a few days until you get the particular brake that the customer wants on it, or the particular wheel, or the particular rim that the customer wants on it?

"A. It *would not happen very often,* Mr. Patterson.

"Q. Well, it does happen though, does it not?

"A. Well, I do not recall of its having happened.

• • • • • •

"A. Well, it would be a *very unusual* thing, to have that happen, because we carry a complete line of Midland brakes, and Bendix brakes, and Westinghouse brakes, and we carry hydraulic brakes in various sizes, and we have a very complete stock of brake parts; and it would be *very seldom.* However, occasionally that arises, where a trailer would be ordered with some very huge tires, or something of that sort, where we would have to wait for them.

"Q. Yes.

"A. But it would be *very unusual.*"

On assessment day all materials on hand are assessed by the City of Detroit, County of Wayne and State of Michigan, and the Company is subjected to, and pays, a personal property tax on this material inventory located and having a situs in the City of Detroit (R. 75).

Only a few men are required to look after the purchases (R. 75). The seven men involved in these proceedings were not employed in the purchasing department of Respondent, and were not in any wise connected therewith (R. 75).

Manufacturing Operations

The manufacturing operations of Respondent consist of (a) fabrication of the various raw materials and rough and partially finished materials; and (b) the assembly of the frame, axles and wheels into the finished trailer chassis; and (c) the building of bodies from lumber and sheet steel upon the finished trailer chassis and painting to complete the finished trailer.

In the manufacturing division, the Company has an engineering department of between twenty-five and thirty-five men, who design and engineer layouts of trailers (R. 75). Then there is the planning department, which is a clerical division of the production division of the business, which supervises the material inventory from the time the materials are received at the plant until they are turned over to the shipping department in the form of finished trailers. This department employs between twenty and thirty men (R. 75). In the tool room ten to twelve men are employed, who manufacture and make fixtures and dies necessary for the various manufacturing operations. This department is also responsible for the repair and maintenance of machinery and equipment (R. 75).

In the machine shop fabricating and machining of all kinds is performed in changing raw, rough and unfinished materials and forgings to a highly manufactured finished state. These operations include sawing, drilling,

tapping, turning, milling, grinding, rough grinding, finished grinding, broaching, pressing, machine riveting, hand finishing and bench assembly, and inspection operations. In this department most of the metal working machinery is operated, including vertical drills, radial drills, single spindle and multiple spindle drills, milling machines, various kinds of lathes, bullards, heavy and medium duty screw machines and a number of other machines of various kinds. In this department all of the rough castings enter for machine work (R. 76). There are several hundred different machine operations required on these rough and unfinished materials and forgings on over two hundred different parts, each of which requires a variation of these manufacturing operations before they may be used in a trailer. These parts for the most part are used on the axle and chassis and are assembled to the chassis and frame of the trailer. About one hundred twenty-five men are employed in this machine shop (R. 76). Photographs showing some of these operations at the plant appear at page 76 of the Record (Exhibits 1-b, 1-c-1, 1-c-2, 1-c-3, 1-c-4, 1-d-1, 1-d-2, 1-d-3, 1-d-4 and 1-d-5).

In the frame shop or steel plant, the main frame of the trailer is built and assembled. Various parts necessary in the building and assembling of the frame are delivered here from other departments. The frame is laid out by layout men to indicate where various holes are to be punched and drilled. The frames are laid out for length and width, and it is here that the frame and the various cross-members thereof are riveted and welded. In this department men operating punch presses, drill presses, metal saw operators and one crane operator are employed (R. 76, 77). Some of the castings completed and finished in the machine shop are then attached to the frame through a riveting process. The men working in this de-

partment must have a knowledge of steel work. Riveters, working in gangs of four and five, rivet the various parts to the steel frame to be used in the chassis of the trailer (R. 76, 77). A photograph showing some of the operations in the frame department appears on page 77 of the Record (Exhibit 1-e). In this department three of the seven men involved in these proceedings, Chaloux, Coonrod and Milne, were employed (R. 76). Chaloux was a rivet puncher and sticker (R. 12, 353, 354); Coonrod was a fitter and prepared the steel parts and frames for riveting (R. 11, 453); and Milne was a layout man in the frame department (R. 12, 374).

The next department is the assembly department. Here all of the parts of the chassis of the trailer, including springs, axles, U-bolts, roller bearings, wheels, rims, tires and brake mechanism, are attached and assembled. Most of the various parts used in the assembly are those machined and finished in the machine shop; other parts, such as wheels, springs and tires, were originally purchased in finished form. All of the parts are laid out in the stock room and delivered by the stock room to this department for assembly (R. 77). Most of the brake equipment, which is made out of rough forgings and castings and finished in the machine shop, together with some other brake equipment which is purchased, is here assembled and affixed to the trailer and operated as power brakes (R. 78).

A coupler is attached to the front end of the trailer chassis and this coupler fits on to the fifth wheel which lays horizontally on the truck to connect the trailer with the truck tractor which hauls the trailer (R. 78, 86). (For a particular description of the fifth wheel, see, infra p. 68. On the front end of two-wheel trailers there is also an understructure, which supports the trailer after the truck

has been detached for unloading. In this department the chassis is completed and delivered over for painting. Peterson, one of the seven men involved in these proceedings, was employed in a certain phase of this assembly department work (R. 18, 78, 459), and also in the change-over department, which was a division of the assembly (R. 463). A photograph showing the work in the assembly department of the plant appears at page 78 of the Record (Exhibit 1-f). After the trailer chassis is assembled, it is painted in the paint department by sprays, following a standard routine, although sometimes special colors are used to meet the customers requirements. About twenty painters are employed in this department (R. 78).

The next division of the manufacturing operation is the body building division. First there is a blacksmith shop, employing about twenty men, who handle bending and forming operations, requiring the heating and treating of metal in blacksmiths' forges (R. 78). There are several wood-working machines for sawing, pressing and otherwise preparing lumber for use in bodies. There are also a number of metal working machines, including presses and brakes, and here sheet metal is formed into various shapes necessary for assembling into the body, and for otherwise preparing the steel for the body (R. 78, 79). These woodworking machines and steel machines and presses are photographed and appear opposite page 79 of the Record (Exhibits 1-g-2, 1-h-2 and 1-h-3).

The greatest number of men working in the body department are known as body builders. They fit the various wood and steel frame work and structure to the chassis and build in and rivet the steel bodies to the frame work. The lumber and steel has all been shaped and prepared for assembly in previous operations at the

plant, with the exception of drilling holes and minor operations, which is done by the assemblers. They fit the various parts together and complete the body (R. 79). Between two hundred and fifty to three hundred men are employed in the body building division (R. 78). Photographs showing the various types of work in this department are set forth in the Record opposite page 79 (Exhibits, 1-g-1, 1-g-2, 1-h-1, 1-h-2, 1-h-3, 1-I and 1-J). In this department the remaining three out of the seven men involved in these proceedings were employed (R. 78, 79). Trusch was a carpenter and body builder (R. 10, 78, 306, 310). Weinmann was a carpenter and body builder and also set up body frames and attached side-rails thereto (R. 13, 78, 319 and 320). Beck was a carpenter and body builder (R. 13, 78, 330-334).

In the decision of the Board, Findings of Fact No. 30 (R. 52), there is erroneously incorporated a statement that Beck had been employed in the shipping department. This error was admitted by the Board in its Brief in the Circuit Court of Appeals. The reference to the shipping department undoubtedly related back to a previous employment of Beck by Respondent some fifteen years theretofore, some time in 1919 (R. 324, 325). Beck was reemployed in 1934 and his foreman was Rosenbusch, the foreman in charge of the body building division at the plant (R. 325). When asked by Counsel for the Board as to what work he did at the time he was discharged Beck replied (R. 330):

"A. Body builder."

He again referred to accidents that happened while building bodies (R. 331, 332, 333). From the complaint and from the proof, it is clear that Beck, during the term

of his second employment from 1934 to the time of his discharge, had been employed in the body building operations at the Fruehauf plant.

In this dapartment are the millwright and maintenance employees who are responsible for the maintenance of the machinery, electric motors and electric wiring at the plant. There are about twelve men employed in this work (R. 80). The inspection department inspects and checks over the trailers after they have been fully manufactured, assembled and painted (R. 80). The other employees at the plant, being only a comparatively few in number, work in the stock room and as factory time clerks, boiler-room operators and similar types of plant work (R. 80).

At the time of the hearing seven hundred men were employed in the manufacturing and production operations of Respondent at the plant in Detroit. Prior to their discharge the seven employees involved in these proceedings were employed in the operations just mentioned. The work of these employees starts at the factory and finishes at the factory (R. 80). These men have nothing to do with the purchase of material nor with the sales or shipment of the finished manufactured product. They have nothing to do with the material until after it has been placed in the material inventory and later taken therefrom for the manufacturing operations. Their work is to fabricate and change the raw and unfinished materials from a rough state through manufacturing processes and to assemble the various parts into a completed trailer product different in form and character from the raw materials which originally were brought into the plant prior to the manufacturing operations (R. 80).

Sales and Distribution

The trailers manufactured by Respondent are marketed and sold under the supervision of the Sales Department directed by Gerald Chamberlain, Vice-President in Charge of Sales, whose office is at the plant in the City of Detroit (R. 80).

At the time of the hearing Respondent had thirty-one branch sales offices in the States of New York, New Jersey, Massachusetts, Connecticut, Pennsylvania, Indiana, Georgia, Louisiana, Kansas, Missouri, Nebraska, South Dakota and Michigan (R. 80, 81). These branch offices are operated by employees of the Company in small garage buildings with sufficient space to display from three to five trailers except in the larger cities where between twenty to thirty trailers are displayed (R. 81). Except for trailers sold from the stock of these branch offices for cash, all orders taken at these branch offices are subject to approval of officials of the Company at Detroit (R. 81).

The Company also distributes trailers manufactured by it through sales made directly to distributors or dealers. The distributors or dealers are the purchasers and pay or are obligated to pay the purchase price to the Company. Distributors and dealers are given a certain discount off of the list price. They in turn sell the trailers to the ultimate consumer at their own risk. Sales by Respondent to distributors or dealers are for cash or are on installment payments under conditional sales contracts or chattel mortgages. The credit of the distributor or dealer, and, where sales are made through branch offices of the Company, the credit of the customer, are subject to the approval of the Credit Department at Detroit (R. 81). For the most part dealers or distributors handle their own

customers' paper, although in a small percentage of cases Respondent assists in financing such sales upon endorsement of the distributor or dealer (R. 81). The conditional sales contract notes and mortgages payable to Respondent are generally negotiated and handled by the Fruehauf Trailer Sales Company, a wholly owned subsidiary, and are not financed by any other financing institution (R. 129).

"In some instances" Respondent consigns trailers to distributors and dealers, retaining the title and right to recall possession of the trailers at all times. Contrary to the Finding of the Board, No. 8 (R. 47), which leaves the impression that the consignment of trailers covers a large part of the distribution, the testimony is clear that trailers are only consigned in a small minority of cases, that is "in some instances" and only for credit reasons (R. 125).

Sales made by Respondent in 1934 amounted to $3,818,000.00 and during that year the nearest competitor of the Company only sold thirty-seven per cent of that amount (R. 11, 123). For statistics showing the development of sales and the position of the nearest competitior in respect thereto, see Board Exhibit 7, a Fruehauf advertisement "It Pays to Serve" (R. 111).

Many customers pick up trailers purchased by them with their own trucks at the factory at Detroit (R. 81). At the time of the hearing shipments to distributors, dealers or customers outside of Detroit and out of the State were generally made by independent carriers, f.o.b. Detroit, with the risk upon the purchaser upon delivery to the carrier at Detroit, the cost of freight to be borne by the customer (R. 81, 129). Similarly shipments were made to the sales branches of the Company. Shipments having

destinations of around four hundred miles from Detroit or less were generally made by truck and trailer, by an independent contractor operating under a state utilities or carriers permit (R. 81, 129, 166). "Some times for convenience in shipping the wheels and tires are removed" (R. 81). This is known as a "knocked down" shipment. Contrary to the Finding of the Board, No. 12 (R. 48), most of the shipments were not "knocked down" shipments. The tires and wheels were only removed for shipment "sometimes for convenience" (R. 81). And contrary to the impression left by the Finding of the Board, No. 12, "knocked down" shipments, so-called, did not involve shipment of trailers in "disassembled condition" (R. 48), but merely involved the removal of wheels and tires (R. 81, 161). The trailers are completed and road tested at the factory before delivered over to the sales department for sale and delivery by the sales department to the customer or to the carrier for shipment (R. 81, 161).

At the branch sales offices Respondent maintains a small stock of parts for repairs and service (R. 86), and has local mechanics who do repair and service work. These mechanics also attach the fifth wheel (i.e., the coupling device between the trailer and the truck which draws it) when the purchaser of a trailer so desires. These activities are stated in detail and discussed infra 68.

Respondent in advertisements and by pamphlets uses the slogan "Engineered Transportation." The Board, at the hearing, attempted to translate "Engineered Transportation" into the idea that every trailer was a specially constructed job. The number of so-called special jobs made according to specifications of customers on contracts, constitutes only a small percentage of the trailers manufactured by Respondent (R. 101). These special

jobs present no particular problem other than to call for a variation of the length or width of frame, variation of design of body, special paint or color, or type of brake equipment. Parts used in making up a special job are mostly standard parts taken from stock (R. 134), and all of the manufacturing and assembling of these so-called special jobs is done entirely at the factory at Detroit (R. 134, 485). By "Engineered Transportation," the sales department of Respondent stresses the importance of having a sales representative in the field, experienced in hauling problems, analyze the requirements of the customer so as to recommend the proper type of trailer equipment which should be purchased by the customer to meet the requirements of the customer as to load, length of trailer, length of truck tractor, combination of tractor and trailers, types of tires, power-brake, road conditions, speed and costs (R. 106, 134) (see Physical Exhibit 12, "Engineered Transportation," page 27). "As a general thing, the trailer is available out of our standard lines" (R. 106).

About eighty per cent of the sales in 1934 were to customers outside of the State of Michigan. Sales were either made through the branch offices or to distributors and dealers outside of the state (R. 153). But when the raw materials which are used in the manufacture of a trailer are bought and are delivered to the factory Respondent does not know whether that particular trailer will be sold in Michigan or out of Michigan nor does it know of what particular trailer these materials may become a part (R. 74, 80).

The seven men involved in these proceedings were in no wise connected with the sales division of the Respondent.

"To find immediacy or directness here is to find it almost everywhere" was well observed by Justice Card-

ozo in his concurring opinion in the Schechter case. It is equally applicable here. And in the opinion of the Court in the Schechter case it is well pointed out by quoting from the opinion in the Minnesota Rate Case—

> "The development of local resources and the extension of local facilities may have a very important effect upon communities less favored and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the State."

It is thus a function of the State to determine (within the proper bounds of governmental action) how its local resources shall be developed and its local facilities extended and the extent (within the proper bounds of governmental action) of the freedom or restriction which shall obtain with respect to internal business of that State.

This case concerns the automotive manufacturing industry. An industry that is to a greatly preponderant major extent an industry of the State of Michigan. Were all other automotive manufacturing to cease throughout the United States the plants of Michigan would supply the nation and the world.

The history and activities of the Fruehauf Company as set forth supra 8, are not peculiar but typical of the industry and can be said in a larger and still more impressive way of many other companies in the industry. The statement in the Board Brief (23-31) in the

Jones & Laughlin case of experiences, reports, investigation and statistics of industrial activities of all kinds and in all places and under all manner of conditions has very little point. If such statement were limited to a statement of the same matters in relation to the automotive industry the statement would not be worth the space required to make it. The Chevrolet strike at Toledo referred to in the Board Brief (p. 23) in the Jones & Laughlin case occurred in 1935 after N. R. A. The automotive manufacturing industry has developed in Michigan over the course of the present century under the conditions of freedom and of restriction that the State of Michigan has seen fit to permit or to impose. The people of Michigan are of the belief that the industry has so developed and has its strength as evidenced by its recuperation from the recent depression leading all other industries and business, because of the policy which the people of Michigan have constantly observed toward the operations of that industry. It has been thought to be and is the outstanding example of good, equitable and harmonious employer-employee relations. With that industry so developed and so now being conducted under the freedom permitted by the State of Michigan, Congress should not have power to interfere and under the Constitution of the United States does not have such power. Congress may permit freedom or impose restrictions (within the proper bounds of governmental action) upon interstate commerce but with respect to the internal business of the State of Michigan in the automotive manufacturing industry Congress is without jurisdiction.

Application of Law to Facts

That manufacturing is essentially local in character should be obvious and clear from its very nature and method. It has long since been so held.

Kidd vs. Pearson, 128 U. S. 1;
U. S. vs. Knight Co., 156 U. S. 1.

These cases are sufficiently discussed in the Briefs in the other cases. For convenience in the discussion herein following the most pertinent language in each respectively is here quoted—

> "Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce."
>
> "Commerce succeeds to manufacture and is not a part of it."

A. Not in Commerce in the Manufacturing Operations.

The fact that materials are shipped from without the State to the plant at Detroit prior to the manufacturing operation does not make the manufacturing operation one of interstate commerce. That fifty per cent are so shipped is not a determining factor. The interstate shipment of materials into the plant comes to an end upon the delivery of the materials at the plant. The materials are then at a complete stop and rest. The materials are commingled with other materials in the material inventory and remain there from one to five months. They are there subjected to local personal property taxation (R. 75). Thereafter the materials are brought out for fabrication in the manu-

facturing operation. The materials are completely transformed in character after several hundred manufacturing operations and are assembled and made a part of a finished manufactured product. The seven employees involved in these proceedings had nothing to do with the purchase of materials or the delivery thereof to the plant, nor anything to do therewith until brought out for fabrication. The manufacturing operations succeed the commerce to the plant and precede the commerce from the plant and are not a part of such commerce. Generally when the materials are purchased and delivered to the plant Respondent does not know into what particular trailer the material may be fabricated and assembled or whether such trailer will be sold within or without the State of Michigan (R. 74, 75, 80).

Intent To Later Ship In Interstate Commerce the Manufactured Product Does Not Render Manufacturing Operations a Part of Commerce.

In the case at bar it was shown from sales experience that approximately eighty per cent of the trailers manufactured by the Respondent eventually were sold or shipped out of the State. This, however, did not make the manufacturing operation, otherwise local in character, one of interstate commerce.

In *Arkadelphia Milling Company vs. St. Louis Southwestern Railway Company*, 249 U. S. 134, an injunction was sought against the enforcement of intrastate railway rates on the ground that the shipper was engaged in interstate commerce in transporting logs from the woods to its mills in the same state where the rough logs were dried, processed and manufactured into staves, headings and hoops which were sold and shipped out of the state. The

manufacturing and drying process required several months and on the average of five months elapsed from the date the rough lumber was received at the mill to the time when it was converted into a finished product and shipped out of the state. The materials on hand at the mill prior to and pending the manufacturing operation were subjected to a general property tax imposed by the State. This Court said at page 151:

> "It is not merely that there was no continuous movement from the forest to the points without the State, but that when the rough material left the woods it was not intended that it should be transported out of the State, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its character, utility, and value. The raw material came to rest at the mill, and after the product was manufactured it remained stored there for an indefinite period—manufacture and storage occupying five months on the average—for the purpose of finding a market. Where it would eventually be sold no one knew. And the fact that previous experience indicated that 95 per cent of it must be marketed outside of the State, so that this entered into the purpose of the parties when shipping the rough material to the mill, did not alter the character of the latter movement. The question is too well settled by previous decisions to require discussion."

In *Oliver Iron Co. vs. Lord*, 262 U. S. 172, the occupation tax imposed by the State of Minnesota upon persons engaged in the business of mining or producing iron ore was held not to contravene the commerce clause. The Mining Company showed that *practically all of its output was mined to fill existing orders and contracts for immediate shipment to consumers outside of the State.* The admitted facts of the case are (page 178):

> "Three-fourths of it is from open pit mines and one-fourth from underground mines. At the open pit mines empty cars are run from adjacent railroad yards into the mines and there loaded. Steam shovels sever the ore from its natural bed and lift it directly into the cars. When loaded the cars are promptly returned to the railroad yards, where they are put into trains which start the ore on its interstate journey. The several steps follow in such succession that there is practical continuity of movement from the time the ore is severed from its natural bed. The operations within the mine and the movement of the cars into and out of the mine are conducted by the plaintiffs. The subsequent transportation is by public carriers. At the underground mines the plaintiffs dig the ore, bring it to the surface through shafts and put it in elevated pockets where it readily can be loaded into cars. The subsequent movements are much the same as at the open pit mines, but their continuity is not so pronounced."

All but a small fractional part of the ore mined was shipped out in the same condition as when it was scooped out of the mine; the remaining ten to twenty per cent was merely concentrated by washing after coming out of the mine and before starting out of the State but the Court stated that the other "usual operations renders this deflection immaterial."

This Court said (178):

> "Mining is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation. (Citing cases). Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce. (Citing cases).

> "The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

Utah Power & Light Co. vs. Pfost, 286 U. S. 165 concerned the validity of an Idaho license tax on the manufacture, generation, and production of electricity. The generating plant was in Idaho from where transmission lines were carried over the boundary into Utah and directly to various consumers in Utah. The Power Company contended that the process of generating electricity and transmitting it across the boundary to consumers in Utah was instantaneous, that the electricity generated from the mechanical force at the water falls could not be stored but of necessity had to be transmitted as soon as it was generated, and that the tax was therefore levied upon interstate commerce. It was contended by the State that, although the transmission to the point of consumption in Utah, was almost instantaneous with the generating of the electricity at the waterfall in Idaho, the mechanical generation of the electricity is a separate and distinct act of production without regard to the subsequent transmission and that the conversion of power into electricity was completed in the generator before it was carried to the transformer and thence transmitted to the consumer. The State contended that the tax was upon the generating or production of electricity and not upon the transmission thereof. This Court sustained the position of the State although there was "no appreciable lapse of time between the generation of the product and its transmission . . . "

This Court in so doing said 180:

> "*The manufacture to order of goods* and their immediate shipment to the purchaser furnishes a helpful analogy, notwithstanding the fact that there the successive steps from order to delivery are open to physical observation, while here the succession of events is chiefly a matter of inference—although inference which seems unavoidable. • • •
>
> "The generator and the transmission lines perform different functions, with a result comparable, so far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce. • • • "

Other cases to the same general effect but which it is deemed unnecessary to state in detail are

Heisler vs. Thomas Colliery Co., 260 U. S. 245;
Chassaniol vs. City of Greenwood, 291 U. S. 584;
Federal Compress & Warehouse Company vs. McLean, 291 U. S. 17.

Use of Trailers by Customers or the Ordering of Trailers by Customers For Use In Interstate Commerce Is of No Relevant Consequence.

This proposition would seem not to require more than bare statement. Any needed support will be found in

Edelman vs. Boeing Air Transp. Inc., 289 U. S. 249,

sustaining a tax on the withdrawal of gasoline from storage where the withdrawal was for putting the same in airplanes operating in interstate commerce.

Delaware Lackawanna & Western R. R. Co. vs. Yurkonis, 238 U. S. 439,

holding a boy engaged in mining coal to be used, transported or sold in interstate commerce was not himself engaged in interstate commerce.

Shanks vs. Delaware Lackawanna & Western R. R. Co., 239 U. S. 556,

holding an employee working in a machine shop in which locomotives used in both interstate and intrastate commerce were repaired who was injured while taking down and putting up fixtures was not engaged in interstate commerce.

Other cases of like general effect are—

Nashville Chattanooga & St. Louis Railway vs. Wallace, 288 U. S. 249;

Industrial Accident Commission v. Davis, 259 U. S. 182.

The Use of Registered Trade Marks Is Referable Solely to Sales and Has No Relevant Relation to the Manufacturing Operations.

Respondent has several registered trade marks. In the applications therefor made in 1924, 1925, 1931 the same were declared to be used in interstate commerce, (Exhibits 9, 10 and 11, R. 121, 122) (Board Finding No. 19 [R. 491]). But this does not thereby constitute its manufacturing operations interstate commerce. As this Court has uniformly declared "commerce succeeds to manufacture and is not a part of it." Trade marks are used to identify a manufacturer's product when sold in competition with competitors' products. The trade mark is not referable to the manufacturing operation but rather identifies the product after the manufacturing operation is completed and when the product is sold in the open market.

Tracing the legislative history of Federal trade mark legislation, the requirement that the applicant show a use of the trade mark in interstate commerce was the only condition and basis upon which congressional action could be predicated, and that use could be established only by goods *sold* in interstate commerce. In declaring the first Federal Trade Mark Act invalid and beyond the power of Congress because it attempted to regulate all trade marks, and not only those used in interstate commerce, the Court among other things said, *Trade Mark Cases,* (supra), 100 U. S. 82, at page 97:

> "So if, when the trade-mark has been registered, Congress has protected its use on *goods sold* by a citizen of one State to another, or by a citizen of a foreign State to a citizen of the United States, it would be seen that Congress was at least intending to exercise the power of regulation conferred by that clause of the Constitution."

Thereafter the next Federal Trade Mark Act was limited only to those applicants who could establish use of their trade marks in interstate commerce. *Werner vs. Searle & Hearth Co.,* 191 U. S. 195, 204. And this use in interstate commerce means use upon a product sold and shipped in interstate commerce. In *Thaddeus Davids Co. vs. Davids,* 233 U. S. 461, the Court said at page 467:

> "This, in substance, prohibits the registration of marks • • • used by dealers in *selling their goods,* which are not valid trade-marks at common law."

See also

Montgomery Ward vs. Sears Roebuck Co., 49 Fed. (2nd) 842, at page 844;

Macaulay vs. Malt Diastase Co., 4 Fed. (2nd) 944, at page 945.

The sale of the Fruehauf trailers in interstate commerce and the use of the trade mark upon the trailers sold in interstate commerce succeed the manufacturing operation. This use of the trade mark in interstate sales does not thereby render the manufacturing operations interstate commerce.

Attaching the Fifth Wheel to Customers' Trucks and Rendering Other Service at Branch Sales Offices Is Work Local in Character. The Manufacturing Operations at the Plant in Detroit are Not Affected Thereby.

Sometimes when a new semi-trailer is sold through a branch sales office and the customer also buys a fifth wheel, the fifth wheel may be attached to the customer's truck tractor by a mechanic employed at the branch office, if the customer desires it (R. 86, 88). For this work there is a small labor charge of between four to six dollars (R. 134). Attaching the fifth wheel to a truck tractor requires no great skill (R. 89, 132, 133). Sometimes when the customer buys a fifth wheel his own mechanic or truckman attaches it to the truck tractor (R. 86). The truckman frequently shifts a fifth wheel from one truck tractor to another and he does the work himself (R. 133).

The fifth wheel is a flat steel plate attached and bolted to the truck tractor, with a circular turn-table horizonally fastened thereto, all in one piece, the circular turntable having an opening in the center. On the front end of the trailer is a flat plate extending horizontally out over the front frame of the trailer. In the center of the lower side of this flat plate on the trailer there is a small knob or king-pin extending downward. This kingpin fits into and through the opening in the fifth wheel

and extends out on the under side of the turn-table plate. On the end of the king-pin is a head or flange which is wider than and extends over the throat of the king-pin. A lever or clamp on the bottom side of the turn-table plate on the fifth wheel fits around the king-pin, which extends through the opening, between the head or flange of the king-pin and the under side of the turn-table plate. A safety device is sometimes used whereby the clamp is bolted down by two bolts and is thus locked securely (R. 132). In another model of the fifth wheel the reverse method of coupling is used. The king-pin is attached to the fifth wheel and extends upwards, and the opening is on the plate on the front end of the trailer. The king-pin then extends through this plate and is fastened by clamps on the top side.

All that is required in installing it on a truck tractor is: to place pieces of wood an inch or more in thickness on each of the members of the chassis frame of the tractor on which the sheet or frame having the fifth wheel mounted thereon as aforesaid is intended to rest. Then such sheet or frame is set thereon. Holes are then drilled through this sheet or frame so as to receive a U-bolt to be placed around the members of the chassis frame of the tractor. Four of these U-bolts are so installed, one at or near each corner of the sheet or frame having the fifth wheel mounted thereon as aforesaid. The nuts on the U-bolts, of course, are tightened up with a wrench.

The Finding of the Board, No. 14 (R. 48), that before most of the Fruehauf Trailers can be used, the Fruehauf fifth wheel must be attached to the customer's truck or tractor, is erroneous and is not supported by evidence. Although there are several different types of fifth wheels manufactured by Respondent and certain advan-

tages thereof are featured in advertising (see Board Exhibit 8, page 112), the fifth wheel coupler manufactured by Respondent fits the coupling unit of most trailers manufactured by other companies and conversely their trailers fit the coupling device on trailers manufactured by Respondent (R. 133, 135). Every time a trailer is sold it is not necessary that a Fruehauf fifth wheel be sold with it. The customer may, and frequently does, have a fifth wheel already on his tractor to which the trailer can be coupled (R. 135).

Where the installation is not a necessary or essential part required in making an interstate sale and does not require the services of a highly skilled technical engineer but may be readily performed by the customer or by general mechanics available locally, as in the case at bar, the service of installation is local in the state in which it is performed and is not a part of an interstate sale.

York Manufacturing Company vs. Colley, 247 U. S. 21. In that case the installation, held to be a necessary part of an "interstate *sale* of the machinery," because it required such highly technical engineering skill of a trained engineer of the Company that it was an essential part of the sale of the machine. It is to be noted in that case that the ice machine sold was a complicated device "guaranteed to produce three tons of ice a day, consisting of gas compression pumps, a compressor, ammonia condensers, freezing tank and cans, evaporating coils, a brine agitator and other machinery and accessories including apparatus for utilizing exhaust steam for making distilled water for filling the ice cans." The installation made under the supervision of the Company engineer consumed three weeks in time and after installation the Company engineer was required by

the contract of sale to submit the machine in operation to a satisfactory test before the sale was consummated.

Similarly, the work of installing large pipe organs in theatres and auditoriums was held to require "not only the highest mechanical skill but a thorough understanding of the methods employed by the manufacturer in the arrangement of mechanical and electrical connections" and among other things required the "installation of high-voltage electrical connections, furnishing and installing the wind trunking between the blower room and the organ chamber, and the furnishing of light, heat, and electric power required for the erecting, tuning, and completion of the instrument." *Aeolian Co. vs. Fischer,* 40 Fed. (2d) 189, 190, 191. Similarly the installation of Aeolian pipe organs as discussed in the case of *Palmer vs. Aeolian Co.,* 46 Fed. (2d) 746, 752, involved in the contract of sale "seven pages of specification . . . It calls for 8972 separate pipes . . . for 430 percussion tones . . . 9505 separate tone producing elements . . . "

Similarly, in the case of *Bay City vs. Fraeier,* 77 Fed. (2d) 570 (Sixth Circuit), the contract of sale of "a complete water works, with intake, power house and filtration plant and all necessary accessories" required the services and supervision of engineers in the erection. Their services were performed over a period of six years and the complexity, highly mechanical skill and precision of this work was emphasized by the Court.

See also the cases below cited each holding the work to be *local and not a part of interstate commerce. Browning vs. City of Waycross,* 233 U. S. 16, involving the installation of lightning rods; *Mandel Brothers vs. O'Neil,* 69 Fed. (2d) 452, 456, involving the installation of hotel equipment and furnishings sold to a hotel; *Andrews Company vs.*

Colonial Theatre Co., 283 Fed. 471 (District Court, Michigan), involving the installation and the fastening of seats in their places to a cement floor in a theatre; *Power Specialty Company vs. Michigan Power Company*, 190 Mich. 699, involving the installation of super heaters; and *Sturtevant Company vs. Leitelt Iron Works*, 196 Mich. 552, involving the sale and installation of a ventilating system. See also *General Railway Signal Co. vs. Commonwealth of Virginia*, 246 U. S. 500.

This work of attaching the fifth wheel is in no wise comparable to the highly skilled service required of a technical engineer in the installation of a complicated ice machine and refrigerating plant which required three weeks to install and test in operation before completion of the sale, or of a water or power house which required six years to erect, or the installation of Aeolian pipe organs which involved the installation of thousands of different parts, and required over a month's work in installation under the supervision of a skilled engineer and musician.

Similarly the ordinary repair work performed by these repairmen at the branch office sales departments and the "change-over" occasionally made when requested by a customer of a tire to a different size or make, or of a brake of a different type or make, or any other work done at the branch repair departments do not render the sale an interstate sale. The same may be said of the services of the few so-called travelling mechanics who supervise the work of the branch sales office repair department.

The Board in respect to mechanical services performed at the sales branches found:

Finding of the Board, No. 13 (R. 48), is that

> "A substantial part of the mechanical services rendered by the branches outside the State of

> Michigan consists of changes in construction, weight, or design. Practically *all trailers* made for the respondent's stock require such changes, and when sales are made from the stock of branch sales offices, the desired changes are made by mechanics employed by the respondent." (Italics furnished).

This finding is absurd and incredible and is not supported by the evidence. Vosler testified that change-overs were only made occasionally where a customer made the request for a change-over at the branch office to a different size or make of tire or to a different type of brake (R. 102). Peterson, one of the discharged employees, indicated in his testimony (R. 461) that he recalled an instance in Akron, Ohio where a few jobs were too heavy and would subject the hauler to too large a weight tax in the state. Some changes were made to reduce the weight about three hundred pounds, or so. In such instances where customers made requests for some change, Peterson testified that it was the "100% policy" at the branches, "especially in stock jobs" to make the change. But from this testimony there can be no proper finding that every stock job requires a complete change in construction, weight or design. To the contrary the only proper and competent finding that can be made from that testimony is that changes are only made in such few instances when requested by the customer and are not necessary in every standard stock job.

The testimony shows that Respondent manufactures forty standard types of trailers to meet the varying requirements of different types of business. These standard models consist of about eight to ten standard chassis with variation of frame, length, type of brake equipment and variation of design of bodies and capacity

(see Physical Exhibit 12, Engineered Transportation, page 12). To suggest that substantial changes in construction, weight and design must be made on every one of these forty standard models of trailers manufactured by Respondent before they may be effectively used is absurd and incredible. Since eighty per cent or more of the trailers manufactured are standard models (R. 101), it is incredible that a manufacturer could profitably manufacture all of these standard models and then require complete change-overs in such major items as changes in construction, weight or design. This Finding, No. 13, of the Board is not supported by evidence, is not plausible and is not credible.

At the time of the hearing there were no assembly operations carried on at any of the sales branches of the Company (R. 81, 102). The operations of the branch repair departments are local to the state in which they are conducted. They are in no wise referable to or a part of the manufacturing operations in the building of the trailer. The services of the repair man at these various branches are all made after the manufacturing is complete and after the trailer has been sold.

B. Not In the "Stream," "Current" or "Flow" of Commerce in the Manufacturing Operations.

The manufacturing operation is not a mere incident in the movement of raw materials or goods from one state through the plant to the ultimate consumer. The consumer does not buy the raw materials which move into the plant. The consumer purchases an entirely different product and this product is the result of the work of the manufacturer. In this involved and complicated manufacturing operation the raw materials and partially

finished materials are converted, fabricated and molded into an entirely different form and state; the manufactured parts are there assembled with other finished parts purchased and the finished trailer is a product altogether different from the materials as of the time they were delivered to the plant.

In the intervening manufacturing operation, the inherent nature and character of the raw materials, partially finished, and even finished, materials are completely changed. The raw materials come to the plant in their rough state. The axles and most parts therefor come to the plant in the form of rough unfinished forgings and castings. There are other raw or rough, unfinished materials required in the manufacture of a trailer. All of these materials are subjected to several hundred different machine operations with different variations. Over two hundred different parts are fabricated and finished in intricate machine operations before they are converted into their final manufactured form and state and are ready for assembly into the chassis of a trailer. Likewise the bodies of trailers are almost completely built from raw, rough and unfinished materials manufactured and converted at the plant. The lumber comes in the form of planks; sheet steel comes in mere strips and sheets. Numerous other materials are used in the building of bodies. The materials purchased come to a complete rest at the plant prior to the manufacturing operation and remain there commingled in the material inventory upwards of one month, and some times as high as three or four months before they reach the manufacturing operation. The finished manufactured trailer, after the manufacturing operation is completed, is entirely different in form and in character and in use from the materials at the time they were delivered to the plant prior to the commencement of the manufacturing operation.

In the charge of the employees and the Union to the Board, it is alleged that:

> "2. Respondent Company is engaged in the manufacture of trailers for trucks and automobiles and is engaged in commerce among the States in its manufacturing plant in Detroit in that its materials come from other States and are manufactured into trailers for shipment into other States; and it is otherwise engaged in interstate commerce" (R. 4, 7).

Likewise in paragraph 2 of the complaint of the Board, it is alleged that Respondent's operations constitute a continuous flow of commerce among the states (R. 10, 18), and in the Concluding Findings of Fact and Conclusions of Law, Item No. 43, of the Decision of the National Labor Relations Board (R. 56), the Board concludes that:

> "the employer-employee relationship which is subject of these complaints arose in connection with an enterprise conducted by the respondent which is a continuous and carefully synchronized combination of purchase, assembly, manufacture, distribution, and sale constituting a great interstate movement, from which local incidents intrastate if taken alone, cannot be separated" (R. 56).

This conclusion of the Board is untenable and unsound. The holding is in utter disregard of the facts and established law. It cannot be justified as the Board has sought to do by the so-called stockyard and grain cases, to-wit, *Swift & Co. vs. United States,* 196 U. S. 375; *Stafford vs. Wallace,* 258 U. S. 495; *Chicago Board of Trade vs. Olsen,* 262 U. S. 1; *Tagg Bros. & Moorehead vs. United States,* 280 U. S. 420.

In *Swift and Company vs. U. S.*, 196 U. S. 375 the Court found that acts by defendants concertedly carried out at the stockyards in Chicago pursuant to practices precedently agreed upon had been done with the object, intent and purpose of unlawfully monopolizing interstate commerce in live stock and fresh meats. The case is sufficiently discussed in the Jones & Laughlin Brief.

The activities of which regulation was upheld in *Stafford vs. Wallace*, 258 U. S. 495 as being within the stream of interstate commerce are sought to be likened to the manufacturing operations of which regulation is here sought to be enforced. But there is no similitude. There the raiser or producer of live stock in the West shipped the live stock to the stock yards at Chicago as a place of market or sale. The raiser or producer still owned the live stock when it arrived at Chicago and was put into the pens for sale. Not only did the raiser or producer then still own the live stock but it was not until then that the raiser or producer began to look for a purchaser. This he did through commission merchants and dealers. The sale at the stockyards after reaching the stockyards was in itself an essential element or step in interstate commerce. The interstate transportation was solely for the purpose of sale after getting to the stockyards,—the stockyards being the well known and generally patronized market. The situation was and is very analogous to that to which the "original package" doctrine is applied. Under that doctrine the sale is a part of interstate commerce. Just so was and is the sale at the stockyards. The foregoing is amply demonstrated by the statements on pages (498), (515) and (518) of the opinion in *Stafford vs. Wallace*.

Chicago Board of Trade vs. Olsen, 262 U. S. 1 is a very similar case to the case last above cited and for similar reasons wholly inapplicable. The following from the

opinion of this Court describes the activities there being regulated—

> "The Chicago Board of Trade is the greatest grain market in the world. Its report for 1922 shows that on that market in that year were made cash sales for some three hundred and fifty millions of bushels of grain, most of which was shipped from States west and north of Illinois into Chicago, and was either stored temporarily in Chicago or was retained in cars and after sale was shipped in large part to eastern States and foreign countries. • • •
>
> "The railroads of the country accomodate themselves to the interstate function of the Chicago market by giving shippers from western States bills of lading through Chicago to points in eastern States with the right to remove the grain at Chicago for temporary purposes of storing, inspecting, weighing, grading, or mixing, and changing the ownership, consignee or destination and then to continue the shipment under the same contract and at a through rate" (p. 33).

It is clear beyond question from the foregoing that what was being regulated was the sale of wheat while it was in the course of movement as wheat in interstate commerce from the grain fields of the West to the mills of the world. That the making of sales of wheat while in such movement was an act directly in the course of interstate commerce could not be doubted. But the regulation sought to reach "future" contracts on which no wheat moving in interstate commerce or otherwise ever would pass in ownership from one person to another. The question was whether the price specified in these "future" contracts had such a direct effect upon or relation to actual sales of real wheat as to be subject to the same regu-

lation as if actual sales. These "future" contracts required performance on or through the Chicago Board of Trade and in form required the delivery of wheat and could in law be satisfied by the delivery of wheat but were not expected to be so satisfied and customarily were not so satisfied but rather by the payment in money on the day specified for performance of the difference between the price specified and the price on the Board on that day of sales of wheat for immediate delivery. It was found that these "future" contracts were of substantially the same effect on the actual sales of real wheat as if they had been intended to result and did ordinarily result in actual change of ownership of real wheat (See pp. 38-39).

In the case of manufacturing, the factories are not mere incidents "in the stream of commerce." The delivery of materials to the factory for the manufacturing process is not to afford a facility for the continuity of interstate movement of these materials from the ultimate growers and raisers of materials to the ultimate consumer. To the contrary, the raw, rough and unfinished materials which are delivered to the plant come to a complete stop and rest prior to the manufacturing operation. In the manufacturing process several hundred different machine operations are involved and the character of the material is completely transformed. The finished trailer manufactured and assembled at the plant is entirely different in utility, purpose and character from the raw materials which were delivered to the plant and remained there for one month and upwards prior to the manufacturing operation. The factory is not in the current of a movement of [illegible]aw or unfinished materials to the ultimate consumer, as in the case of live stock and grain.

The cases of

Arkadelphia Milling Co. vs. St. Louis Southwestern R. R. Co., 249 U. S. 134, and
Oliver Iron Co. vs. Lord, 262 U. S. 172

cited and discussed supra 61, 62 negative any stream of commerce argument.

United Leather Workers International Union vs. Herkert & Meisel Trunk Co., 265 U. S. 457

is closely in point. There was a strike by employees against a manufacturer to prevent the continued manufacture of goods. The manufacturer purchased materials from out of the State for use in the manufacturing operations. The finished goods were designed for shipment on existing orders to points outside the State. The strikers sought to obstruct the manufacturing operation. It was held that this was not a conspiracy to restrain interstate commerce. This Court said (p. 471)—

> "It is true that they were, in this labor controversy, hoping that the loss of business in selling goods would furnish a motive to the complainants to yield to demands in respect to the terms of employment; but they did nothing which in any way directly interfered with the interstate *transportation* or *sales* of the complainants' product."

It would seem that

Carter vs. Carter Coal Co., 298 U. S. 238

should set at final rest any possible contention in respect of the "stream," "current" or "flow" of commerce having any application to such industrial operations as are here under consideration. For it should be obvious upon bare statement that the effect of industrial strife in local

employer-employee relationship is precisely the same both in nature and extent upon interstate commerce distribution whether the course or sequence of activity is

> mining—distribution of product, or
> purchase of materials—manufacture—distribution of product.

Whether or not any activity (e. g., purchasing materials) preceded the local employer-employee relationship has no possible connection with or bearing upon the activity (distribution of product) succeeding such local relationship or the relationship between the local activity (mining or manufacturing) and the succeeding activity (distribution of product).

C. Do Not "Affect Commerce" in the Manufacturing Operations.

Nor Have the Acts of Respondent, As Charged by the Board, Burdened or Obstructed Commerce or the Free Flow Thereof, Nor Will They Tend So To Do.

In its decision, the Board concluded as a matter of law in paragraphs 44, 45 and 46 (R. 56, 57), that

> "any cessation or obstruction of operations at the Respondent's Detroit factory necessarily has a direct, material, and substantial effect in burdening and obstructing commerce and the free flow of commerce between the State of Michigan . . . and other states in which it sells and to which it ships for sale trailers . . ." (Par. 44).

The Board further concluded that

> "the acts of the Fruehauf Trailer Company complained of caused unrest and confusion among the

> employees in the Respondent's Detroit plant, which had the effect of burdening and obstructing commerce and the free flow of commerce between the State of Michigan . . . and other states in which it sells and to which it ships for sale trailers . . ." (Par. 45).

In paragraph 46, the Board further concluded that the acts complained of

> "tended to lead to a labor dispute burdening and obstructing commerce and the free flow of commerce between the State of Michigan . . . and other states in which it sells and to which it ships for sale trailers . . . "

These conclusions of the Board are contrary to well established law. These conclusions, in effect, hold that although the manufacturing operation, in which the employees involved in these proceedings were engaged, in and of itself is purely local in character, nevertheless if a labor dispute were to arise, and if the operations at the factory were shut down as a result of the dispute, that raw materials would not be shipped in to the factory at Detroit and the finished product would not be shipped out, and that this would burden and obstruct commerce and the free flow thereof; that any unrest caused among the production employees, therefore would have the effect of burdening and obstructing commerce and the free flow of commerce, and that any acts which would lead to a labor dispute might tend in the future to burden and obstruct commerce.

United Leather Workers International Union v. Herkert & Meisel Trunk Co., 265 U. S. 457, cited and discussed supra 80 is directly in point.

In the two cases of

United Mine Workers v. Coronado Coal Co., 259 U. S. 344, and

Coronado Coal Co. v. United Mine Workers, 268 U. S. 295,

the grounds of action were that the employees had conspired to halt mining operations by strikes and accompanying intimidation and interference with workers. In the first case it was charged that the stopping of mining operations would prevent coal from being shipped in interstate commerce and that therefore the acts were in violation of the Sherman Anti-Trust Act. But this contention was rejected by this Court and the injunction denied. In the second case it was charged that the conspiracy was intended to obstruct the movement of coal already mined and on its way in interstate commerce. The injunction was accordingly granted.

The "intent" or the "necessary effect" of an act or course of action which must be present to bring the act or course of action within the scope of the power of Congress have been well and clearly pointed out by this Court. There is no occasion for controversy or loose language in the discussion of the same.

The statement in the first *Coronado* case is the most definite, has not been departed from and it is doubtful whether it could be improved. The statement there was—

> "intended to restrain commerce • • • or has necessarily such a direct, material and substantial effect to restrain it that the intent reasonably must be inferred" (p. 410).

"Necessary" is not to be separated from "direct." Of an act or course of action there are many incidental

results, just as there are many direct results. That the former follow just as uniformly or inevitably and are of as extensive consequence or effect as the latter does not convert the former into the latter. The three building cases well exemplify this—

Industrial Association v. United States, 268 U. S. 64;
Bedford Cut Stone Company v. Stone Cutters' Association, 274 U. S. 37;
Levering & Garrigues Co. v. Morrin, 289 U. S. 103.

In each of these three cases the effect of the course of action complained of upon interstate commerce was to curtail the use in building of materials which to that time had been coming into the State and had been used in building. In the first and third cases this was an incidental result albeit a necessary result of the course of action complained of while in the second case it was a direct result, the course of action complained of being directed solely and exclusively at materials which had been shipped in interstate commerce.

But in the Board Brief in the Jones & Laughlin case the ideas of "intent" and "necessary effect" though recognized and adopted as two bases of what is denominated the control power (p. 39) are left far behind and the ambit of Federal power pushed out to include dealing with any situation which presents "a reasonable likelihood that a strike if it occurred would involve an intent to affect commerce" (p. 14), that is, such "intention might reasonably be expected to develop" (p. 16) and the Board is to determine "the probability of the occurrence of an evil which Congress could control" (p. 34), that is, whether the situation is comparable to and of the same general type as those situations "from

which in the past there had evolved strikes with intent to affect commerce • • • or • • • such • • • intention might reasonably be expected to develop" (p. 40). And then pushing out in another direction basis for the exercise of Federal power is found in "recurring evils which in their totality constitute a burden on interstate commerce" (p. 14), though such evils arise from activities "usually of only local concern" (p. 72), and this is extended to any situation "where the reduction in the supply of the commodity is so large that an intent to burden and obstruct interstate commerce may be inferred" (p. 45), that is, the magnitude of the effect is deemed to bring the same within "necessary effect" (p. 46), though it is recognized that under the decision of this Court in the first Coronado case it would have made no difference if "the natural result would be to keep the preponderant part of the output of the mine from being shipped out of the State" (p. 45).

It would seem that the only answer required to such tenuously attenuated argument is that it is wholly untenable. It presumes to find its basis in the decisions of this Court herein discussed and none other except that next cited. The discussion herein and in the Associated Press and Jones & Laughlin Briefs of those cases fully demonstrates there is no such basis in those decisions. And as for the case of

United States v. Patten, 226 U. S. 525

that arose upon demurrer. The Circuit Court accepted as an allegation of fact "the statement in the counts that interstate trade and commerce would necessarily be obstructed by the operation of the conspiracy" (p. 541). This Court must then and did "accept the Circuit Court's construction of the counts" (p. 535). This Court in disposing

of the matter made a most excellent statement as to what is meant by necessary effect, saying (p. 543):

> "In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result."

From these authorities it is clear that even if the finding of the Board as to the acts of Respondent were true, and even if the acts would result in creating unrest in the plant at Detroit, and this in turn would result in an impairment of the manufacturing operations, the effect on interstate commerce would be too indirect and remote to permit of federal regulation thereof. And in this connection, it is to be noted that the testimony in this case conclusively shows that since the founding of the Company there has never been a strike at the plant which hampered the Company's operations. "We have never had a delay of any kind in our operations, and I do not know just what the result would be" (R. 136). And even if the fact that Respondent pays the highest wages in the trailer industry and has never had any serious labor difficulties which impaired its operations were to be overlooked, nevertheless in view of the foregoing authorities, the position of the Board could not be sustained.

Conclusion on Commerce Question

The National Labor Relations Act cannot constitutionally be applied to manufacturing operations or to production employees therein. To permit of such regulation would be to expand the powers of our limited federal government under the Commerce Clause into a complete centralized state, obliterating all privileges and rights of local self government reserved to the states under the Tenth Amendment. Whether or not the National Labor Relations Act apart from pure legal considerations, would be economically, socially or politically desirable, is subject to serious debate and question. But regardless of its objectives, they cannot be achieved at the price of destroying our constitutional form of government. During the past one hundred and fifty years under our constitutional form of government, conditions of both labor and industry have reached a higher standard, so that even today, after a serious depression, both are on a much higher plane and level than those of all other Nations of the world. To destroy those principles of government is to destroy with one blow the interests of both labor and industry. Our Constitution does not permit it.

POINT III.

The National Labor Relations Act Is Repugnant to and in Violation of the Fifth Amendment to the Constitution of the United States.

This point has two aspects: first, procedural rights and second, substantive rights.

The first is not discussed as such in the other briefs though procedure is discussed in the Jones & Laughlin Brief. The second is discussed in the Associated Press Brief, pages 64-85, and in the Jones & Laughlin Brief. Those discussions are adopted.

Procedure Under National Labor Relations Act Is a Denial of Due Process

The procedure for challenging an order of the National Labor Relations Board is prescribed by the Act in detail in Section 10. This procedure is made exclusive (Section 10, Subdivision (e), last sentence) and "the findings of the Board as to the facts if supported by evidence shall be conclusive," but "the rules of evidence • • • in courts • • • shall not be controlling."

This is not due process in respect of rights asserted under the constitution. In the recent case of *Morgan vs. United States*, 298 U. S. 468, which arose under the Packers and Stockyards Act the Court in its opinion said:

> "When the Secretary acts within the authority conferred by the statute, his findings of fact are conclusive. • • • But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion.

> "If upon the facts alleged, the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside."

Just prior to the decision last above cited the question was re-examined at length in the case of *St. Joseph Stock Yards vs. United States*, 298 U. S. 38, and the theretofore well established principle of judicial review reaffirmed. That principle is:

Where a right is asserted as arising from or protected by the Constitution of the United States any issue as to such right and its infringement (whether by official or other action) must be open for determination by and must be determined by the judiciary "upon its own independent judgment as to both the law *and the facts.*"

Ohio Valley Water Company vs. Ben Avon Borough, 253 U. S. 287.

Not only does the making of the finding of a legislative, executive or administrative agency "conclusive" deny due process but even to make such finding *presumptively* correct denies due process for no judgment is "independent" which starts with a presumption that the judgment of some one else is correct.

A case involving the employer-employee relation is

Crowell vs. Benson, 285 U. S. 22 (see p. 46).

Here a person claiming to be an employee made claim under the Longshoremen's Compensation Act for injury. The Deputy Commissioner found that the employment relation existed as claimed. The Court on a bill filed by the alleged employer to restrain enforcement of the award heard the matter de novo and found that no employment

relation existed. This was affirmed by this Court with the statement (page 57):

> "The Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

This case is more fully stated and further quotation made from the opinion in the Jones & Laughlin Brief.

The Substantive and Substantial Right of Liberty of Contract Is Impinged and Curtailed to Such Extent and in Such Manner That It Is Denied.

In founding our constitutional form of government, a federal government of granted and limited power was created; all other powers of government were reserved to the states, while certain inalienable rights were reposed exclusively in the people. The Constitution was ratified by the states only upon the tacit understanding that the subject-matter of the first ten amendments would promptly be formulated in the form of amendments and then submitted to the States for adoption.* These ten amendments, commonly designated as the "Bill of Rights", were safeguards and guaranties designed to protect both the people and the sovereign states from the dangers of encroachment by the federal government. In the first eight amendments to the Constitution is a guaranty of specific rights guaranteed to the people, and then to further se-

* See Charles Warren on "The Making of the Constitution," pages 768-9, and references contained in footnote 1 on page 769.

cure these rights to the people the Ninth Amendment provided:—

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

And the Tenth Amendment provided:—

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Not until there was a general understanding among the people that the first ten amendments, restricting the powers of the federal government, would be adopted would the states ratify the Constitution. In the early case of *Barron vs. Baltimore*, 7 Peters, 243, which involved the question of whether the Fifth Amendment restricted state governments, as it did the federal government, Chief Justice Marshall, himself a strong federalist, said at page 250:

> "But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments."

One of the fundamental rights guaranteed to the people with which federal governments may not interfere is contained in the due process clause of the Fifth Amendment in that part which provides:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

After the Civil War, states likewise were subjected to similar restrictions of due process to safeguard rights of citizens by the adoption of the Fourteenth Amendment to the Constitution. By these provisions of the due process clause, people are guaranteed not only the physical liberty of their persons and homes, but they are secured against governmental interference in the free choice and determination of their individual and private business enterprises and affairs and in the general conduct thereof. Most forceful is the statement of Mr. Justice Peckham in the case of *Allgeyer vs. Louisiana*, 165 U. S. 578, at page 589:

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Employees cannot be compelled to work for an employer contrary to the employee's wishes. Likewise, as will be more particularly discussed hereinafter, the employer is free to employ in his business such employees as he in his

own judgment and discretion chooses, and he may refuse to employ others whom he does not wish to employ. This Court has held that government may not interfere with the rights of employers and employees by fixing wages, *Adkins vs. Children's Hospital,* 261 U. S. 525; *Wolff vs. Industrial Court,* 262 U. S. 522 and 267 U. S. 552, or with the right of a citizen in business to deal with such customers as he chooses, and to refuse to deal with others with whom he does not choose to do business, *Federal Trade Commission vs. Raymond Co.,* 263 U. S. 565; *United States vs. Colgate & Co.,* 250 U. S. 300; Grenada *Lumber Co. vs. Mississippi,* 217 U. S. 433; *In re Louis Wohl, Inc.,* 50 Fed. 2nd, 254. Nor may the government deprive a citizen of the free choice in determining for himself the business in which he will engage, *New State Ice Co. vs. Liebmann,* 285 U. S. 262, nor impose upon the owners of a private business, not affected with a public interest, the price for which their goods, property or services shall be sold, *Ribnik vs. McBride,* 277 U. S. 350; *Williams vs. Standard Oil Co.,* 278 U. S. 235; *Tyson vs. Banton,* 273 U. S. 418.

As was said in the case of *Adkins vs. Children's Hospital,* 261 U. S. 525, supra, at page 546:

> "There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."

The Court has in a few instances upheld statutes which impinged upon rights secured to individuals under the due process clause. but only under exceptional circumstances and for limited periods of time. *Wilson vs. New,*

supra. And these decisions have gone to the very borderline permitted by law, the Court in *Wolff Packing Co. vs. Court of Industrial Relations,* 262 U. S. 521, supra, saying at page 544:

> "It is not too much to say that the ruling in *Wilson vs. New* went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster. Certainly there is nothing to justify extending the drastic regulation sustained in that exceptional case to the one before us."

See *Railroad Retirement Board vs. Alton Railroad Co.,* 295 U. S. 330, 369.

In the case at bar, the unfair labor practices charged against Respondent may be summarized from the four typical allegations applied to all of the seven employees involved in these proceedings, Nos. 7, 8, 9 and 10 (R. 11):

The charge is that Respondent discharged and refuses to reinstate Woolery Coonrod for the reason that he

joined and assisted a union
engaged in concerted activity for collective bargaining

and that Respondent in so doing did

interfere with, restrain and coerce its employees in the exercise of rights guaranteed by the Act
discriminate in regard to hire and tenure of employment
discourage membership in a union.

By virtue of the discharge of the seven employees involved in these proceedings, the Board in its complaint concludes that these acts constituted a violation of Section 8, subdivisions (1) and (3) of the Act. Denying the charges of the Board, Respondent made answer as quoted

supra 15 which was supported by testimony as stated on the same page.

For the purpose of this point the charges of the Board are to be considered as upon demurrer to a bill of complaint. The factual determination of the correctness of these charges and of the Findings of the Board in relation thereto are not to be considered.

One of the fundamental rights guaranteed under the due process clause is the right of an employer in the operation of his business to freely contract for such services and labor as he in his sole discretion believes to be to the best interest of his business. If Respondent in the exercise of this right, discharged the seven employees involved in these proceedings solely because they were members of a union, this Court has held that in the conduct of its business it had the right so to do, and that any law which deprives the employer of the right to exercise his discretion in the selection and retention of employees in the operation of his business deprives him of a fundamental right guaranteed to him under the due process clause.

This very question was before this Court in *Adair vs. United States,* 208 U. S. 161. A federal statute pertaining to employees of interstate railroad companies was before the Court for consideration. Many of the provisions of the statute were similar in general context to the provisions of the Act here before the Court. Under the railroad statute considered by the Court in the *Adair* case, it was made a misdemeanor for any railroad employer, or officer or agent thereof, who shall—

> "require any employee, or any person seeking employment as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor

> corporation, association, or organization; *or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization . . .* " (168)

Adair, an agent of an interstate railroad, was indicted under the act because he discharged an employee named Coppage from the service of the Company "*because of his membership in a labor organization*—no other ground for such discharge being alleged" (page 171). He demurred to the indictment, just as Respondent here in this portion of the argument is demurring to the charge made by the Board. Adair contended that the statute was unconstitutional, that it had no reasonable relationship to the regulation of commerce, and that it was in violation of the due process clause of the Constitution. This Court sustained both contentions and declared the Act invalid. In considering the due process clause, the Court said, at page 172:

> "that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; . . . .
>
> "it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.

> So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization."

Later in the case of *Coppage vs. Kansas,* 236 U. S. 1, the *Adair* case was again followed. In the *Coppage* case a statute of the State of Kansas made it a misdemeanor for an employer

> "to coerce, require, demand or influence any person or persons to enter into any agreement . . . not to join or become or remain a member of any labor organization or association as a condition of . . . securing employment or continuing in the employment . . . ".

This provision is similar in purpose and general context to Section 8 (1) of the Act in the case at bar. Coppage, superintendent of a railroad, requested a switchman, by the name of Hedges, to sign an agreement "to withdraw from a switchmans' union while in the service of the Frisco Company." Hedges was informed that if he did not sign that he could not remain in the employ of the Company. Hedges refused to sign and refused to withdraw from the labor organization. Coppage thereupon discharged him from the service of the company. The local Kansas Court found Coppage guilty and subjected him to a fine. The judgment was affirmd by the Supreme Court of Kansas, but

was reversed by this Court on the ground that the state statute was repugnant to the due process clause of the Fourteenth Amendment.

It was contended by the State in the *Coppage* case that the question there involved differed from the question before the Court in the *Adair* case. The Court, however, found no essential difference between the cases, saying at page 13:

> "Under the constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will. It follows that this case cannot be distinguished from *Adair vs. United States.*"

In answer to the argument that an employee's membership in a labor organization does not necessarily affect his duty to his employer, this Court said at page 19:

> "To this line of argument it is sufficient to say that *it cannot be judicially declared that membership in such an organization has no relation to a member's duty to his employer;* and therefore, if freedom of contract is to be preserved, the employer must be left at liberty to decide for himself whether such membership by his employee is consistent with the satisfactory performance of the duties of the employment . . . . Conceding the full right of the individual to join the union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man, any more than the same individual has a right to join the union without the consent of that organization . . . . "

The dissenting opinion concedes the correctness of the rule in the *Adair* case, saying at page 32:

> "There is nothing in the statute now under consideration which prevents an employer from discharging one in his service at his will."

but, distinguishes the *Adair* case on the grounds advanced by the state that a state by statute may declare it to be contrary to public policy to require a person to forego rights he may wish to exercise in the future by agreement, binding his future conduct in advance thereof.

The principle of the *Adair* and *Coppage* cases was later again affirmed in

> *Hitchman Coal & Coke Co. vs. Mitchell*, 245 U. S. 229.

The defendants, a union and its officers, were by intimidation, threats and other means directed against employees of plaintiff's mine, interfering with relations existing between plaintiff and its employees and seeking to compel the unionizing of the mine. The mine superintendent had previously advised the employees that "if any man wanted to become a member of the union he was at liberty to do so, but he could not be a member of it and remain in the employ of the Hitchman Company, that if he worked for the Company he would have to work as a non-union man. To this each man employed gave his assent, understanding that while he worked for the Company he must keep out of the union" (p. 239). This Court in finding for plaintiff said at page 250:

> "*Whatever may be the advantages of 'collective bargaining,' it is not bargaining at all, in any just sense, unless it is voluntary on both sides.* The same liberty which enables men to form unions, and through the union to enter into agreements with

> employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. *Adair vs. United States*, 208 U. S. 161, 174; *Coppage vs. Kansas*, 236 U. S. 1, 14."

And these cases were again cited with approval in the case of *Adkins vs. Children's Hospital*, 261 U. S. 525.

To the question: May an employer discharge an employee because he becomes or is or insists on remaining a member of a Union? The answer under the *Adair*, *Coppage* and *Hitchman* cases clearly is Yes. But it is said that the National Labor Relations Act forbids and such regulation is valid under or since the decision in

> *Texas & New Orleans Railroad vs. Brotherhood*, 281 U. S. 548.

It is said in effect that an employer may discharge an employee because of "race, color or previous condition of servitude" but not for membership in a union. And that such in effect if not express holding is the *Texas & New Orleans Railroad* case just cited. The *Adair* case is cited with approval in the opinion of the Court in the *Carter* case and the *Texas & New Orleans* case in the separate opinion of the Chief Justice in the *Carter* case. They are

not so cited as being in any wise conflicting. And they are not. The Court in the *Texas & New Orleans* opinion was very careful to say and to say explicitly that the cases were not conflicting—that the principle of the *Adair* and *Coppage* cases was "inapplicable" to the situation presented in the *Texas & New Orleans* case.

This case arose under the Railway Labor Act of 1926. Plaintiff Brotherhood had represented the clerical employees of the Railroad since the organization of the Brotherhood in 1918. In 1923 the Railroad and Brotherhood had made a written agreement covering rates of pay and working conditions. In 1925 the Brotherhood applied to the Railroad for an increase of wages. This was refused by the Railroad and an appeal taken by the Brotherhood to the United States Railway Labor Board. This appeal was pending when the 1926 Act took effect. It was remanded to the parties and thereafter came before the Board of Mediation created by the 1926 Act. Proceedings were had before the Board of Mediation extending through the year 1926 and into 1927.

While the proceedings were so pending the Railroad and its officers (as was alleged in the bill of complaint) had "for the express purpose of interfering with, influencing and coercing the plaintiff railway clerks concerning . . . . the designation of a representative . . . . to act for them in the pending controversy before the United States Board of Mediation" undertook, instigated and encouraged the formation of a so-called company union and various acts were set out and alleged to have had the effect of furthering the purpose aforesaid.

The District Court granted an injunction saying:

> "I think there is sufficient evidence to justify the Court in the belief that activities have been had on the part of some of the officials of the railroad com-

> pany which have the effect of interfering with or influencing self organization and that a temporary injunction should be granted."

The injunction restrained "interfering with, influencing, intimidating and coercing . . . . with respect to their free and untrammeled right of selecting or designating their representatives" for the purpose above stated.

Thereafter the Railroad and its officers were prosecuted for alleged violation of the injunction and were by the District Court adjudged to be in contempt. The case came before this Court on review of the judgment of contempt and the decree making the injunction permanent.

The Brotherhood in its Brief before this Court said:

> "The Railway Labor Act in the first place does not make it a crime for an employer to hire whom he pleases, or discharge whom he pleases. The Act does not attempt to limit his power of hiring or discharge. The Act provides only that those who *are* his employees shall have the right to designate their own representatives to negotiate with him concerning terms and conditions of employment and be free from any effort on the part of the employer to perpetrate a fraud under the employees . . . (in such negotiation).
>
> "It must be apparent that there is not in issue in the present case the basis of the decision in the *Adair* case, that is, the right of the employer to hire whom he pleases. Nor is there in issue in the present case the basis of the *Coppage* case, that is, the right of the employer to discharge whom he pleases."

The *Texas & New Orleans* case presented a case of what has been long and familiarly known as "abuse of legal process." Nothing more and nothing less. And it was

for this reason that this Court said there was not involved the normal exercise of the right to discharge employees. This is clear from a statement of some of the salient and basic features of the case, namely—

(a) The injunction covered only clerks "on its lines" and expressly excepted those in the general offices, which were at Houston and New Orleans (See foot note p. 556). It thus was limited to clerks engaged directly in interstate commerce.

(b) The acts of the Railroad and its officers complained of in the original bill of complaint as well as the acts which were held to be violative of the injunction were all *subsequent* to the submission to and participation before the Mediation Board *by the Railway.*

(c) "The sort of conduct • • • prohibited" was described by the Court by saying

> "'Interference' with freedom of action and 'coercion' refer to well understood concepts of the law. • • • 'influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.' The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this Act than in relation to well-known applications of the law with respect to fraud, duress and undue influence."

In other words the "interference," "coercion" and "influence" prohibited did not extend to the effect upon employees of the employer making it clearly known (as in the *Coppage* and *Hitchman* cases) that: You cannot remain in the Union and remain in our employ. There had to be

something more and different on the part of the employer than the exercise of a legal right. And the draftsman of the 1926 Act there before the Court had been careful to state in Section 7 that no legal obligation was intended to be created by the Act.

When the Brotherhood applied to the Railroad for an increase of wages the Railroad then had complete freedom to exercise in the normal manner its legal rights. Among those rights was the right to say—We will not deal with you as a Union, we will not bargain collectively, in fact if you remain in the Union you cannot remain in our employ. Had that been said and the clerks remained in the Union and then been discharged that would have been (in the words of the Court) "the normal exercise of the right of the carrier • • • to discharge [its employees] them" and in the further words of the Court "The Railway Labor Act of 1926 does not interfere" therewith.

But instead the Railroad looking to the procedure which Congress had seen fit (in the words of the concurring opinion in the *Carter* case) "to provide for the peaceful settlement of disputes" chose to make use of that procedure and participate in proceedings before the Board of Mediation under that Act. In other words the Railroad made *deliberate* and *voluntary* choice of that procedure as more to its interest than the normal exercise of its undoubted legal rights. Having thus chosen to make use of such procedure the Railroad then sought to pervert or abuse such procedure and (in the words of the Brief for the Brotherhood) "perpetrate a fraud upon the employees through making contracts, fixing the terms and conditions of employment, which purport to bind employees who have not given their supposed representatives authority to speak for them, or whose supposed representatives have been

influenced in fact to betray their principals." In other words, accomplish an effect like that which has been known to be improperly done in private litigation such as suborning of witnesses or paying a sum (on the side) to the attorney of the opposite party.

Until the Railroad thus *deliberately* and *voluntarily* chose to make use of the procedure before the Board of Mediation its legal rights were in no wise affected by the Railway Labor Act of 1926. But when the Railroad chose to take the benefits of that procedure it must take the obligations which go therewith among which was the obligation to abstain from any act which would affect the free and untrammeled functioning of the procedure thus provided including so abstaining from "interference, influence or coercion • • • over • • • designation of representatives by the other" party—employees or clerks.

Thus correctly understood the *Texas & New Orleans* case in no wise qualifies, narrows or impinges upon the legal rights of the employer as upheld in the *Adair, Coppage* and *Hitchman* cases.

The National Labor Relations Act goes farther and provides (Section 8, Subdivision 5) that the employer shall bargain collectively and (Section 9, Subdivision a) that such bargaining shall be with the representatives designated by "the majority of the employees" in the bargaining unit. This unit is such as shall be determined by the Board. Neither employer nor employee is given any right in making such determination. In other words, if one or more or forty-nine per cent of the employees desire to bargain singly and individually or in small groups the employer is by the terms of the Act prohibited from bargaining with them. Or if the employer for reasons arising in the conduct of the business desires to bargain with some one

or more or group such bargaining is prohibited. The employer may not however be prohibited from "permitting employees to confer with him" Section 8 (2). If a majority of the employees should become members of the I. W. W. or some organization and the same should be in its tenets or methods repugnant to other employees the employer must nevertheless bargain solely and only with such majority organization and as before pointed out is prohibited (Section 8, Subdivision 3) from discouraging membership in such majority organization. If this legislation stands the employer is deprived of the most substantial of his rights and the guaranty of liberty by the Fifth Amendment is meaningless.

It will be interesting—and should be helpful—to inquire in this connection: at just what point in the development of their business did the Fruehaufs lose their right to say whom they would hire and whom they would retain. Surely when August Fruehauf was in his blacksmith shop working with his own hands shoeing horses and setting tires on wagons he had full right to say how many helpers he would have and who they would be and for what reason they would be let go. When the motor vehicle came along and August Fruehauf conceived the idea that he could make trailers for trucks and tractors—four-wheel trailers for trucks and two-wheel trailers for tractors—and could find a sale for them because they would substantially increase the usefulness and value to the owners of trucks and tractors, that surely did not partake of the nature of a conspiracy to do a wrong. When he further conceived the idea that by so doing he could build up a business into which he could take his sons then growing up and his sons-in-law to be and finally leave to them as an inheritance an established business he did no more than the ordinary prudent citizen endeavors to do. When in the carrying out

of his ideas he began to furnish opportunity for work to a few and then more and still more persons, that was not a wrong, legal or moral, against any individual in particular or society in general. At just what point then or by reason of just what circumstance did he lose the rights with which he began? When in the order of nature he began to decline with advancing years and the boys (sons and sons-in-law) that he took into the business and trained began to take more and more of the responsibility as the business grew and grew until finally a few years back he went to his reward satisfied that he had accomplished something in life and thereupon full responsibility for the business passed to the boys just what wrong against individuals or society had the boys committed that their common and ordinary rights should be curtailed or lost? The boys are in charge and controlling owners of the business today. True an interest therein has been transferred to others in order to get needed capital at times and to induce worthy employees to come into and to stay with the business but the family still has a substantial majority control. The worst that can be said about August Fruehauf and his sons is that he and they followed the old admonition about building a better mouse trap and the world came to his and their door until, as the record shows, the business is the largest of its kind today. But no one had to buy their product and no one had to enter their employ. Nor were they under any duty to furnish employment to any one. At what point then did they lay themselves open to intrusion by absentee labor organizers and to control by an administrative agency armed with the broadest of inquisitorial powers unrestrained by any rules as to the competency or relevancy of the subject of any particular inquiry, and be subject to punishment for resenting it?

The seven employees here involved were employed at will and not under a term contract. The employment could be terminated by either party at any time. In the operation and conduct of its business it was essential that such persons be employed and retained as the management believed would perform their work in a manner consistent with the success and interests of the Company. If in the exercise of its judgment, the selection of employees be wise the Company would profit thereby, and on the other hand if its judgment be unwise, to that extent the business and enterprise would suffer. The risk of the enterprise and any loss suffered therein is borne solely by the employer. For the Government to prescribe whom an employer shall hire and retain in his employ deprives the employer of his right to exercise his own judgment in the operation and conduct of his business, while at the same time he is subjected to the risks and loss thereof. Such a regulation is clearly repugnant to the Fifth Amendment.

The National Labor Relations Act like the acts before the Court in the *Adair* and *Coppage* cases imposes a compulsory and inescapable rule or obligation upon the employer. It is in no sense procedural and limited in its purpose or provisions to safeguarding the functioning of such procedure as was the Railway Labor Act of 1926 before the Court in the *Texas & New Orleans* case. To take as typical the provision of Subdivision 3 of Section (8), namely:

> "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

This is patently neither more nor less but precisely the same thing as was before the Court in the *Adair* and *Cop-*

page cases. It is a difference in words but not in effect. It provides a rule of substantive law. It overturns theretofore existing substantive rights as declared in the *Adair* and *Coppage* cases and deprives the employer of those rights and is not within the ruling in the *Texas & New Orleans* case.

As was said in the *Coppage* case, 236 U. S. 1, supra (p. 19):

> "If freedom of contract is to be preserved, the employer must be left at liberty to decide for himself whether such membership by his employee is consistent with the satisfactory performance of the duties of the employment. . . . Conceding the full right of the individual to join the union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man, any more than the same individual has a right to join the union without the consent of that organization. . . . ."

It is obvious that if the right of the employer thus described is to be preserved the exercise thereof will of necessity violate Subdivision 3 of Section (8) of the National Labor Relations Act. This is but stating in the converse that the provisions of Subdivision 3 of Section (8) are violative of the rights of the employer protected by the Constitution.

What was said in the case of *Wolff Packing Co. vs. Court of Industrial Relations*, 267 U. S. 552, 569, in respect to the system of compulsory arbitration invoked by the Kansas Act, might likewise be said in respect to the National Labor Relations Act:

> "The system . . . . which the Act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It will

> constrain them not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. . . . . Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment. 'The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.' *Meyer vs. Nebraska*, 262 U. S. 390, 399."

The National Labor Relations Act contravenes the Fifth Amendment to the Constitution.

CONCLUSION

The National Labor Relations Act is contrary and subversive to the Constitution. By its provisions, the Congress of the federal government, which the people and the states invested with only granted and limited delegated powers, is attempting to regulate matters of local concern far outside of the scope of its power to regulate interstate commerce and in violation of the Tenth Amendment. Whatever argument may be advanced for a dominant centralized government, which would obliterate the right of local self-government by the states, "it is sufficient to say that the Federal Constitution does not provide for it." Whatever argument may be advanced for governmental control of the private affairs of citizens and of their business and industry, which would make citizens subject to the direction and domination of government in the conduct of their every day lives and affairs, and which would deprive them of the right to exercise their own

individual initiative, judgment and discretion in the conduct of these affairs, our Constitution does not permit it. The Fifth Amendment preserves this right for the people.

Change of times has been advocated as a reason to legislate our Constitution into a nullity. Times may change, but our constitutional form of government has remained constant. Through one hundred and fifty years of changing social and economic life and strife, it has sustained us—while other governments have tottered and other peoples have surrendered themselves to the fate of subjects of an autocratic or totalitarian state.

The National Labor Relations Act strikes at the basic form of our government and rights of our citizens. It, therefore, cannot be sustained.

It is respectfully submitted that the decrees of the Circuit Court of Appeals

(a) vacating and holding for naught, and

(b) dismissing the petition of the Board to enforce the order of the National Labor Relations Board of December 12th, 1935, directed to Respondent be affirmed.

Respectfully submitted,

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